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### Repository Citation

Robert M. Jarvis and Phyllis Coleman, *Benjamin N. Cardozo: New York Giant*, 13 Marq. Sports L. Rev. 63 (2002)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol13/iss1/5>

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## ESSAY

# BENJAMIN N. CARDOZO: NEW YORK GIANT

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Although much has been written about the life of Benjamin N. Cardozo,<sup>1</sup> his connection to baseball has been all but overlooked.<sup>2</sup> Accordingly, this

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The authors gratefully acknowledge the assistance of Robert Emery, Associate Director of the Schaffer Law Library (Union University); James D. Folts, Head of Reference Services at the New York State Archives; Beth Gordon, Public Services Librarian at the Dr. Lillian & Dr. Rebecca Chutick Law Library (Yeshiva University); and Sarah Tabor, Reference Librarian at the Law Library and Technology Center (Nova Southeastern University). The authors also would like to thank their fellow speakers and participants at the “Batter Up! From the Baseball Field to the Courthouse: Contemporary Issues Facing Baseball Practitioners” symposium which was held at the Benjamin N. Cardozo School of Law on April 30, 2001. It was after attending this conference that we began to wonder whether there was a connection between Justice Cardozo and baseball.

1. See, e.g., GEORGE S. HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE (1940); ANDREW L. KAUFMAN, CARDOZO (1998) [hereinafter KAUFMAN TEXT]; BERYL HAROLD LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING, WITH SELECTED OPINIONS (1938); RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS (1997); JOSEPH P. POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION (1935); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); Paul Bricker, *Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge*, 11 OHIO N.U. L. REV. 1 (1984); Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZO L. REV. 235 (1988); Jerome I. Hyman, *Benjamin N. Cardozo: A Preface to His Career at the Bar*, 10 BROOK. L. REV. 1 (1940); Symposium, *Benjamin Nathan Cardozo*, 1 CARDOZO L. REV. 1 (1979); Bernard Weissman, *Cardozo: “All-Time Greatest” American Judge*, 19 CUMB. L. REV. 1 (1988); Stanley Charles Brubaker, *Benjamin Nathan Cardozo: An Intellectual Biography* (1979) (unpublished Ph.D. dissertation, University of Virginia) (on file with the University of Virginia Alderman Library).

It should be pointed out that almost everything published about Cardozo deals with his judicial decisions and philosophy. Cardozo was an extremely private man, and little about his life off the bench can be stated with certainty. Moreover, nearly all his personal papers were burned shortly after his death by his close friend Irving Lehman, who eulogized Cardozo as, “A man of fastidious reticence, [one who] guarded jealously his personal privacy.” POLENBERG, *supra*, at 3. As a result, we do not know what Cardozo thought or felt about a great many subjects of only ordinary or passing interest. For a further look at the problems Cardozo poses to would-be biographers, see *id.* at 3-5. See also Andrew L. Kaufman, *Cardozo and the Art of Biography*, 20 CARDOZO L. REV. 1245 (1999) (describing his forty-year struggle to write what is now considered the definitive study of Cardozo).

2. For the only instances the authors have discovered in which Cardozo and baseball are mentioned together, see *infra* notes 223-26 and accompanying text and note 324. The failure to link Cardozo and baseball may have something to do with the fact that, as explained *infra* notes 16-18 and

article explores Cardozo's ties to the game,<sup>3</sup> notes the parallels between him and Babe Ruth,<sup>4</sup> speculates as to his favorite team,<sup>5</sup> and takes a guess regarding which position he would have wanted to play.<sup>6</sup>

### I. EARLY INNINGS

Cardozo was born in New York City on May 24, 1870,<sup>7</sup> a small boy "from a family of short-lived and rather sickly individuals."<sup>8</sup> In his early years, he spent much of his time with his twin, Emily, and his sister, Elizabeth, who suffered from a severe spinal problem.<sup>9</sup> Following the death of his mother

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accompanying text, Cardozo was Jewish. "Indeed, Judaism traditionally eschewed a sports culture. In antiquity, sports were associated with pagan worship, and for centuries Jews did not regard sports as an area of life in which success should be sought. So Jewish parents encouraged their children to become lawyers, doctors, engineers, and teachers." ROBERT SLATER, *GREAT JEWS IN SPORTS* 1 (rev. ed. 2000). Despite this cultural bias, by the time Cardozo was born in 1870, see *infra* note 7 and accompanying text, Jews could be found throughout baseball:

The Jew has been active in every phase of baseball from its beginning. Jewish names are prevalent in the earliest box scores which appeared in sporting journals of the 1850s. The first known Jew to play baseball was Boaz Pike of Brooklyn, N.Y. in 1857. He was soon followed on the diamond by his younger brother, Lipman E. Pike, who later achieved immortality as the first man to play the game professionally in 1866. Even before the Pikes, one of the outstanding catchers in the New York area was Leonard G. Cohen of the Gothams, whose name may indicate his ancestry. Seaman Lichtenstein was treasurer of the Gothams from 1857-59. By 1870, baseball had captured the fancy of the nation. The Jewish population was equally enthusiastic . . . The 1880s saw an increase not only of players, but of Jewish executives on and off the field. By the 1890s, Jews had interests in big league clubs in many cities.

BERNARD POSTAL ET AL., *ENCYCLOPEDIA OF JEWS IN SPORTS* 27 (1965). As Postal explains, anti-Semitism in baseball increased substantially between 1900 and 1920. *Id.* Nevertheless, some Jews continued to find their way into the majors and at least two—catcher Johnny Kling of the Chicago Cubs and pitcher Erskine Mayer of the Philadelphia Phillies—reached the top ranks. See HAROLD U. RIBALOW & MEIR Z. RIBALOW, *JEWS IN BASEBALL STARS* 12-26 (1984). It also is worth noting that in 1938, the year Cardozo died, see *infra* note 285 and accompanying text, outfielder Hank Greenberg of the Detroit Tigers, regarded as one of baseball's greatest Jewish players, hit fifty-eight home runs and just missed breaking Babe Ruth's single season mark. RIBALOW & RIBALOW, *supra*, at 49-50.

3. See *infra* notes 7-218 and accompanying text.

4. See *infra* notes 219-303 and accompanying text.

5. See *infra* notes 304-23 and accompanying text.

6. See *infra* notes 324-41 and accompanying text.

7. KAUFMAN TEXT, *supra* note 1, at 6; POLENBERG, *supra* note 1, at 6; POSNER, *supra* note 1, at 1.

8. POSNER, *supra* note 1, at 4. According to another biographer, Cardozo was in "feeble health" from the time he was born. KAUFMAN TEXT, *supra* note 1, at 15; see also HELLMAN, *supra* note 1, at 21 (noting Cardozo was "frail of physique"); POLENBERG, *supra* note 1, at 6-7 (calling Cardozo "a delicate youth").

9. KAUFMAN TEXT, *supra* note 1, at 22. It has been suggested Cardozo's masculinity may have been impaired because his twin was a girl. See POSNER, *supra* note 1, at 6. But see POLENBERG, *supra* note 1, at 11-12 (refuting this contention).

Rebecca in 1879 from a stroke, Cardozo primarily was raised by his sister, Ellen.<sup>10</sup> Because of the difference in their ages, Cardozo saw little of his only brother, Albert, Jr., who was thirteen years his senior, and his older sister, Grace.<sup>11</sup> Cardozo's other two siblings, both unnamed, died in childbirth.<sup>12</sup>

Considering his frailty and lack of male companionship,<sup>13</sup> it is not surprising that Cardozo took no interest in athletics.<sup>14</sup> Other influences also played a role. As Sephardim who had come to the United States in the middle of the eighteenth century, the Cardozos and the Nathans (his mother's relations) were part "of the elite of American Jewry."<sup>15</sup> Accordingly, they

10. KAUFMAN TEXT, *supra* note 1, at 21. As Kaufman points out, the relationship between Cardozo and Ellen (nicknamed Nell or Nellie) "became so close that it occupied her whole life and a very substantial part of his." *Id.* Indeed, Cardozo never married, preferring instead to be with Nellie, with whom he shared a household until her death in 1929. *Id.* at 84-87. This has led to considerable speculation as to whether he had romantic feelings for Nellie (especially in light of his frequent references to himself as her "doggie"). See KAUFMAN TEXT, *supra* note 1, at 68, 147; POSNER, *supra* note 1, at 5.

11. KAUFMAN TEXT, *supra* note 1, at 21-22.

12. *Id.* at 10.

13. Because he was educated at home, first by his mother, then by a governess, and later by a private tutor, Cardozo did not have the opportunity to make male friends at school. *Id.* at 22-23. Although his numerous male cousins did pay regular social calls with their families, Cardozo failed to form close ties with any of them. *Id.* at 22.

That Cardozo lived in a household populated and run by women, and was affected by its nature, has been made clear by Alan M. Stroock, who clerked for Cardozo for two years and whose father knew Cardozo both in college and at the bar. Stroock has written that Cardozo's "family gave predominance to the influence of its female members, and his personal idiosyncrasies were in part a consequence of this." Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 20-21 (1979); see also POSNER, *supra* note 1, at 95 n.3 (calling Cardozo "the least macho of eminent judges").

14. As we actually know very little of Cardozo's personal life, see *supra* note 1, this statement is made with some hesitation and is based on his activities as an adult. Thus, it is possible Cardozo was interested in sports but the proof has been lost.

15. HELLMAN, *supra* note 1, at 6-10; KAUFMAN TEXT, *supra* note 1, at 6-7. The social standing of New York's Sephardic community, and the impact this had on Cardozo's early development, cannot be overstated:

Two of the Justice's significant characteristics as a human being were his extraordinary self-esteem and his sensitiveness to adverse comments or to any lack of respect from others. These traits were probably the result of his early upbringing as a member of that now almost extinct group of families who were descendants of the Spanish and Portuguese Jews who came to New York in Dutch Colonial days, more commonly known as Sephardic Jews. When the German and the East European Jewish immigrants arrived, the old families not only felt themselves overwhelmed by numbers and by the fact that the predominant form of Judaism became Ashkenazic rather than Sephardic; their group also maintained a sense of social aloofness. Belonging to one of those families, which were even then diminishing in number, the Justice was brought up with social contacts limited almost exclusively to members of his own and related families.

Rauh, Jr. et al., *supra* note 13, at 20. Similar sentiments can be found in KAUFMAN TEXT, *supra* note 1, at 6-10; POLENBERG, *supra* note 1, at 13-18; POSNER, *supra* note 1, at 1, 5-6. For a history of the

devoted a substantial amount of time to a variety of social and philanthropic causes; they also spent long hours on their careers, amassing sizeable fortunes as lawyers, bankers, merchants, traders, and brokers.<sup>16</sup> At the center of these busy lives was religious worship at the city's oldest temple, Congregation Shearith Israel.<sup>17</sup>

Sports, on the other hand, had no place on their agenda, and not just because of a lack of time. In the nineteenth century, members of the upper class generally took a dim view of such recreation; the rough-and-tumble nature of most athletic contests added to the sense that they were the province of the coarser elements of society.<sup>18</sup> For the Cardozos, who prided themselves on their refinement and valued manners greatly,<sup>19</sup> such activities were to be avoided. That they were a clan beset by myriad medical problems made such a conclusion all the more sensible.<sup>20</sup>

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Sephardim that includes an extensive discussion of Cardozo's family, see STEPHEN BIRMINGHAM, *THE GRANDEES: AMERICA'S SEPHARDIC ELITE* (1971).

16. KAUFMAN TEXT, *supra* note 1, at 10.

17. *Id.* at 23 (noting Cardozo "was raised in the life of Congregation Shearith Israel"). Founded in 1730 by the descendants of victims of the Spanish Inquisition, Congregation Shearith Israel (Remnant of Israel) adhered strictly to Orthodox tradition: Services were conducted in Hebrew, men and women sat in separate sections, and the mood was consistently serious, bordering on grave. In all respects, it was a much more austere and decorous temple than the ones subsequently established by the Ashkenazim, Jews who began arriving in America in the 1830s and hailed from Central and Northern Europe. *Id.* at 7-8; POLENBERG, *supra* note 1, at 13-15.

18. By 1870, this view had led to a rigid partition based on caste. On the one hand, gentlemen "amateurs" belonged to elite athletic clubs; membership in these organizations confirmed social rank, provided helpful connections, and advanced careers. On the other hand, working-class "professionals," who could not afford to play for free, became itinerants seeking to escape the otherwise limited—and brutal—ways of making a living in nineteenth century America. See William Gerberding, *Historical Perspective of Amateurism*, 22 J.C. & U.L. 11 (1995); see also STEVEN A. RIESS, *TOUCHING BASE: PROFESSIONAL BASEBALL AND AMERICAN CULTURE IN THE PROGRESSIVE ERA* 163-64 (rev. ed. 1999) ("Many middle-class parents discouraged their sons from entering professional baseball . . . because they did not want them associating with such immoral, low-class men. Few collegiate ballplayers became professionals because of the stigma attached to pro sports. Parents vigorously disapproved of their daughters socializing with or marrying ballplayers.").

19. Throughout his life, Cardozo had uncommonly good manners; one of his biographers describes him as "exceedingly polite." POSNER, *supra* note 1, at 6. Posner also mentions that Cardozo "was effusive in his praise of others," "considerate of other people's feelings," and "modest." *Id.* at 8-9. Like so much else about Cardozo, these facets of his personality were directly attributable to his upbringing:

Family visits contained their own formalities and strains. It was expected in the Cardozo-Nathan clan that, on meeting a relative, one inquired specifically after the health of every other member of the family. "Any deviation, any temporary forgetfulness," said Annie Nathan Meyer, "was set down as a deliberate slight, to be resented as such. In this respect, I am certain that my beloved cousin, Mr. Justice Cardozo, would never be caught napping." Ben mastered the rules at an early age.

KAUFMAN TEXT, *supra* note 1, at 22 (footnotes omitted).

20. It has been suggested that the poor health of Cardozo and his relatives was partly the result of

In light of his sheltered existence, Cardozo almost certainly was unaware of the fact that important developments were taking place throughout baseball, which had been invented a mere twenty-five years before his birth.<sup>21</sup> In 1869, while Rebecca was pregnant with Benjamin and Emily, the Cincinnati Red Stockings traveled about the country as baseball's first salaried club.<sup>22</sup> Then, when Cardozo was six, the National League was founded.<sup>23</sup> With it came the

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"inbreeding within the small Sephardic community; 'both sets of [Cardozo's] grandparents had been marriages of cousins, as had at least two sets of . . . great-grandparents.'" POSNER, *supra* note 1, at 4 (quoting BIRMINGHAM, *supra* note 15, at 300).

21. It generally is agreed that baseball as we know it was invented by Alexander J. Cartwright, Jr. in 1845 and played for the first time on June 19, 1846, when the New York Nine beat the New York Knickerbockers 23-1 at Elysian Fields in Hoboken, New Jersey, just across the river from Manhattan. See *BASEBALL ROOTS: THE FASCINATING BIRTH OF AMERICA'S GAME AND THE AMAZING PLAYERS THAT WERE ITS CHAMPIONS* 11-18 (Ron McCulloch ed., 2000). But see Edward Wong, *Baseball's Disputed Origin is Traced Back, Back, Back*, N.Y. TIMES, July 8, 2001, § 1, at 1 (reporting on recently-discovered newspaper accounts of baseball games in 1823). For additional readings on baseball's beginnings, see, e.g., ROBERT F. BURK, NEVER JUST A GAME: PLAYERS, OWNERS, AND AMERICAN BASEBALL TO 1920 (1994); EARLY INNINGS: A DOCUMENTARY HISTORY OF BASEBALL, 1825-1908 (Dean A. Sullivan ed., 1995); HARVEY FROMMER, PRIMITIVE BASEBALL: THE FIRST QUARTER-CENTURY OF THE NATIONAL PASTIME (1988); WARREN GOLDSTEIN, PLAYING FOR KEEPS: A HISTORY OF EARLY BASEBALL (1989); BENJAMIN G. RADER, BASEBALL: A HISTORY OF AMERICA'S GAME (1992); DAVID QUENTIN VOIGT, AMERICAN BASEBALL: FROM GENTLEMAN'S SPORT TO THE COMMISSIONER SYSTEM (1966).

22. Besides ushering in the era of the professional, the Red Stockings' trip was memorable in other ways:

The club, which wore bright red stockings made for them by a young lady named Margaret Truman, was called the Cincinnati Red Stockings. With a total annual payroll of \$9,300, they were the first openly professional baseball team, and that year they barnstormed all over the country, taking on all comers . . . The great Red Stockings national tour of 1869 took the team to such cities as New York, Boston, Washington, Cleveland, Chicago and as far west as San Francisco. They played the best local teams they could find and annihilated them all, ending up with a record of 56 wins and one tie. (The tie resulted when the Troy Haymakers walked off the field in the sixth inning with the score tied 17-17 so that gamblers who had laid money on the Troy team could avoid paying off.) The Red Stockings also revolutionized the way baseball players dressed; the spiffy knee-length flannel knickers and long stockings they wore soon became all the rage among ball clubs and replaced the traditional long trousers that dated back to the early days of the Knickerbocker Club . . . In 1869 the normal admission fee to most professional baseball games was 25 cents, but the Red Stockings were such a draw on the road that they usually demanded, and got, a guarantee that a 50-cent entrance fee be charged . . . On their 1869 nationwide tour . . . the Red Stockings traveled nearly 12,000 miles and played before over 200,000 persons. Total gate receipts were \$29,724.87; salaries and expenses, \$29,726.26; net profit, \$1.39.

BASEBALL ROOTS, *supra* note 21, at 42-44.

23. *Id.* at 48. The National League was created by William A. Hulbert following the demise of the short-lived National Association, "a loosely knit organization renowned for its rowdiness, erratic schedule, open gambling on games, liquor selling in parks, bribery and other forms of chicanery." *Id.* at 46. To ensure they avoided the problems that had plagued the National Association, Hulbert and his colleagues established a number of stiff conditions:

The National League immediately banned open gambling and liquor sales at games, vowed to expel clubs that failed to stick to schedules and later on even prohibited the playing of league games on Sunday. It

Mutuals, New York City's premier team.<sup>24</sup> Although the National League proved a success, the Mutuals did not: After compiling a lackluster 21-35 record, they were thrown out of the league for refusing to make their final western road trip because of anticipated financial losses.<sup>25</sup> Following the demise of the Mutuals, New York City went without professional baseball for the next six years.<sup>26</sup>

In 1883, Cardozo turned thirteen and, in accordance with Jewish law, celebrated his Bar Mitzvah.<sup>27</sup> As if in recognition of his coming of age, the major leagues returned to New York in the form of the American Association's ("AA") Metropolitans and the National League's ("NL")

was agreed that written contracts between clubs and players were to be respected, thereby ending the practice of teams pirating players away from each other. Only cities with populations of at least 75,000 would be eligible for franchises in this new venture. Umpires were to be paid (they got \$5 per game). An admission fee of 50 cents to all league games was set. Each club agreed to play each rival team 10 times during the season; failure to do so would result in expulsion from the league. Clubs agreed to pay \$100 in annual dues.

*Id.* at 48-49. For further discussions of the National Association and the National League, see A BASEBALL CENTURY: THE FIRST 100 YEARS OF THE NATIONAL LEAGUE (Rutledge Books, 1976); TOM MELVILLE, EARLY BASEBALL AND THE RISE OF THE NATIONAL LEAGUE (2001); LOWELL REIDENBAUGH, 100 YEARS OF NATIONAL LEAGUE BASEBALL 1876-1976 (1976); WILLIAM J. RYCZEK, BLACKGUARDS AND RED STOCKINGS: A HISTORY OF BASEBALL'S NATIONAL ASSOCIATION, 1871-1875 (1992). See also the sources cited *supra* note 21.

24. The Mutuals had been formed in 1857 as an amateur club composed mostly of city employees. Backed by the notorious politician William M. "Boss" Tweed, who contributed large sums of money and sat on its board of trustees, the team was named after the Mutual Hook and Ladder Company Number 1. Initially, the Mutuals played their home games in Hoboken; in 1868, however, they relocated to Brooklyn. After winning the disputed championship of 1870, the squad joined the National Association, where it made its best showing in 1874 (second place at 42-23). Following the collapse of the National Association in 1875, the Mutuals became a charter member of the National League. See *Mutual History: The Amateur Years 1857-1870*, at [http://members.aol.com/\\_ht\\_a/nymutuals/MutualHistory.htm](http://members.aol.com/_ht_a/nymutuals/MutualHistory.htm) (last visited June 23, 2001); *Mutual History: The Professional Years 1871-1876*, at [http://members.aol.com/\\_ht\\_a/nymutuals/MutualHistory2.htm](http://members.aol.com/_ht_a/nymutuals/MutualHistory2.htm) (last visited June 23, 2001); see also RIESS, *supra* note 18, at 70. For the Mutuals' year-by-year statistics in both the National Association and the National League, see TOTAL BASEBALL: THE OFFICIAL ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL 2042-47 (John Thorn et al. eds., 7th ed. 2001). The decision to invite the Mutuals into the National League was not without risk, and required more than a little faith:

Over the years the Mutuals had developed a notorious reputation for "hippodroming" or fixing games, and even though William Hulbert had created the N.L. to clean up baseball, he nevertheless admitted the Mutuals to the league because he felt it necessary to have a franchise in the New York City area.

BASEBALL ROOTS, *supra* note 21, at 356.

25. BASEBALL ROOTS, *supra* note 21, at 356. The Philadelphia Athletics were expelled for the same reason. *Id.*

26. RIESS, *supra* note 18, at 70.

27. KAUFMAN TEXT, *supra* note 1, at 24; POLENBERG, *supra* note 1, at 16-17.

Gothams.<sup>28</sup> Besides having the same owner—local tobacco merchant John B. Day<sup>29</sup>—the two franchises shared the same home: a stretch of Central Park known as the Polo Grounds located at 110th Street and 6th Avenue,<sup>30</sup> just a short distance from Cardozo's house at 68th Street and Madison Avenue.<sup>31</sup>

Neither squad had much success during its inaugural campaign: The Metropolitans went 54-42 and finished fourth,<sup>32</sup> while the Gothams were sixth with a 46-50 record.<sup>33</sup> Their fortunes quickly improved, however, and in 1884 the Metropolitans won the AA pennant.<sup>34</sup> Four years later, the Gothams (renamed the Giants) brought home their first NL flag.<sup>35</sup>

Shortly after his Bar Mitzvah, in an important break with his family,

28. The Metropolitans had been founded in 1880 as an independent club but joined the American Association when it expanded from six to eight teams in 1883, its second year of operation. *BASEBALL ROOTS*, *supra* note 21, at 354. The Gothams had started in the National League in 1879 as the Troy Trojans. When they ceased operating at the end of the 1882 season, the franchise was moved to New York City and renamed. *Id.* at 352.

29. Day had begun dabbling in baseball in 1879 by organizing (and playing for) a semi-professional team in Orange, New Jersey. After pitching in a game against the Brooklyn Metropolitans, Day met James J. Mutrie, a local sports figure. The two men struck up a friendship and soon formed the Metropolitan Exhibition Company to capitalize on Day's money and Mutrie's baseball connections. NOEL HYND, *THE GIANTS OF THE POLO GROUNDS: THE GLORIOUS TIMES OF BASEBALL'S NEW YORK GIANTS* 22-23 (1988); TOM SCHOTT & NICK PETERS, *THE GIANTS* *ENCYCLOPEDIA* 81 (1999); *see also* RIESS, *supra* note 18, at 70-71.

30. The Metropolitans inhabited the west side of the Polo Grounds, charged twenty-five cents for admission, permitted fans to drink during games, and drew a working-class crowd, while the Gothams occupied the east side, got fifty cents for tickets, prohibited drinking, and had a middle-class following. SCHOTT & PETERS, *supra* note 29, at 82, 397. On days when the teams played at the same time, a large piece of canvas was hung between the two fields; despite this precaution, at certain angles it remained possible for spectators to watch both games. *Id.* In 1885, the Metropolitans built a new ballpark of their own at 107th Street and First Avenue, but the next year, following the team's sale to Erastus Wiman, they moved to Staten Island and took up residence at the St. George's Cricket Grounds. RIESS, *supra* note 18, at 104-05. The Giants remained in Central Park until 1889, when they relocated two miles north to the "new" Polo Grounds at 155th Street and Eighth Avenue. *Id.* at 105; SCHOTT & PETERS, *supra* note 29, at 397-401; *see also* STEW THORNLEY, *LAND OF THE GIANTS: NEW YORK'S POLO GROUNDS* (2000) (describing the Polo Grounds in detail and providing useful background information on early New York City baseball clubs).

31. KAUFMAN TEXT, *supra* note 1, at 19.

32. *TOTAL BASEBALL*, *supra* note 24, at 2056.

33. *Id.* at 2055.

34. *BASEBALL ROOTS*, *supra* note 21, at 354. Following the season, the Metropolitans played (and lost) a three-game series against the Providence Grays, the champions of the National League, in what many have come to regard as the first World Series. *See* *TOTAL BASEBALL*, *supra* note 24, at 267.

35. *BASEBALL ROOTS*, *supra* note 21, at 352. The Giants capped off their season by beating the St. Louis Browns, the champions of the American Association, in a ten-game World Series that included both neutral-site bouts (held in Brooklyn and Philadelphia) and two meaningless contests played after the Giants had clinched the Series. *TOTAL BASEBALL*, *supra* note 24, at 271.



Cardozo stopped attending religious services.<sup>36</sup> But this act of rebellion resulted in little additional leisure time for the young man, who by now was being prepared by the famed Horatio Alger, Jr. to take the five-day examination for admission to Columbia University.<sup>37</sup> He passed, and in the fall of 1885 enrolled as a freshman in its School of Arts.<sup>38</sup> Sadly, during the year Cardozo lost his sister, Grace, twenty-four, to a bout of pneumonia (brought on by measles) and his father, Albert, fifty-six, to nephritis, a kidney disease.<sup>39</sup>

Grace's passing caused Cardozo only personal grief, but his father's death engulfed him in public shame. In 1872, Albert had become embroiled in a widely-reported corruption investigation that eventually forced him off the bench.<sup>40</sup> Although he managed to hang on to his law license (due to the

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36. KAUFMAN TEXT, *supra* note 1, at 24 ("Later in life, Cardozo often referred to himself in private correspondence as a 'heathen.'"); POLENBERG, *supra* note 1, at 18 ("Within a year or two after his bar mitzvah, a rabbi who knew him recalled, he 'had swung away from all interest in ceremonial religion, and during his later life did not attend religious exercises at the Synagogue.'").

37. KAUFMAN TEXT, *supra* note 1, at 25-26; POLENBERG, *supra* note 1, at 18-24; POSNER, *supra* note 1, at 2. Although he is chiefly remembered today for his tales of young newsboys rising from rags to riches through hard work and clean living, Alger came to the Cardozo household with a tarnished reputation. In 1866, while serving as minister of the First Unitarian Church and Society in Brewster, Massachusetts, he was dismissed for sexually molesting two minors. Departing hastily, Alger moved to New York, where he turned to writing and tutoring. Alger lived in the Cardozo household from 1883 to 1885, and while there coached both Cardozo and his sister Elizabeth. He also found time to write two novels; in one of them, entitled *Frank Hunter's Peril* (1885), the hero's trustworthy friend is a boy named Ben Cameron who bears a striking resemblance to Cardozo. While there is no evidence that Alger ever made an improper sexual advance towards Cardozo, KAUFMAN TEXT, *supra* note 1, at 25, it has been suggested that spending "two years with a tutor intent on hiding a furtive past" may have contributed to Cardozo's "strongly moralistic outlook and his unusual sense of reserve." POLENBERG, *supra* note 1, at 43. Polenberg also believes

Cardozo may have absorbed elements of Alger's distinctive view of personal relationships, in which sexuality tended to be equated with unscrupulous men preying, feral-like, on trusting widows, and in which security was found only in idealized, nonsexual forms of affection: between a boy and his mother, or a boy and a girl who was like a sister to him, or a boy and an older, protective male or father-surrogate.

*Id.* at 23. Many years later, Cardozo discussed Alger in a letter written to Milton H. Thomas of Columbia University: "My preparation for college . . . was the work of Horatio Alger. He did not do as successful a job for me as he did with the careers of his newsboy heroes." LEVY, *supra* note 1, at 3. It has been said that by this rather curious choice of language,

Cardozo meant that he had not acquired the riches popularly associated with those heroes. He had, however, surely acquired the work ethic so close to his teacher's heart. Moreover, . . . Alger did precisely what he had been hired to do. "I have finished teaching at the Cardozos," Alger wrote on July 1, 1885, "Bennie . . . has been admitted to college."

POLENBERG, *supra* note 1, at 23-24.

38. KAUFMAN TEXT, *supra* note 1, at 26-27; POLENBERG, *supra* note 1, at 24; POSNER, *supra* note 1, at 2.

39. KAUFMAN TEXT, *supra* note 1, at 26-27; POLENBERG, *supra* note 1, at 24.

40. KAUFMAN TEXT, *supra* note 1, at 11-20; POLENBERG, *supra* note 1, at 24-31; POSNER, *supra*

intervention of one of his former judicial colleagues), his reputation was ruined.<sup>41</sup>

Because he had been only two at the time, Cardozo had not been conscious of his father's embarrassment; in later years, the subject appears to have been avoided in the Cardozo household.<sup>42</sup> But now the affair was prominently mentioned in Albert's obituaries and Cardozo, a sensitive and reserved teenager, suffered considerable pain.<sup>43</sup>

In October 1885, just a month before Albert died, Monte Ward, star shortstop of the New York Giants as well as a recent Columbia Law School graduate, formed baseball's first union.<sup>44</sup> Known as the Brotherhood of Professional Base Ball Players, its goals included forcing the owners to modify the reserve clause (which bound players to their teams indefinitely) and abandon the salary cap (which tied wages throughout the league to the poorest team's budget).<sup>45</sup>

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note 1, at 1-2. Throughout the affair, Albert insisted he was innocent. While the passage of time has made it somewhat difficult to evaluate his assertion, on balance it appears Albert was guilty. Although he was suspected of many things, Albert ultimately was brought before the Judiciary Committee of the New York State Assembly on five counts:

The first charge related to Cardozo's part in the aftermath of the Gold Conspiracy of 1869 when Jay Gould and James Fisk, having failed in their effort to corner the gold market, sought to employ the legal system to reduce their losses. The second charge involved unlawful release on habeas corpus of convicted clients of the law firm of Howe & Hummel. The third charge alleged that Cardozo failed to specify charges against two women whom he had imprisoned in an effort to force them to reveal the whereabouts of a child whose custody was at issue; the charge also alleged that he had prevented a lawyer from acting on the women's behalf. The fourth charge concerned his refusal to vacate an order that Judge Barnard had issued in a case that Barnard had not himself heard. Cardozo allegedly would not correct the obvious error because Barnard's order had denied alimony to the wife of State Senator Thomas C. Fields, an influential member of Tammany Hall. The fifth charge concerned both Cardozo's alleged nepotism respecting Gratz Nathan and his general political favoritism in the appointment of receivers and referees.

KAUFMAN TEXT, *supra* note 1, at 17.

41. KAUFMAN TEXT, *supra* note 1, at 19-20; POLENBERG, *supra* note 1, at 30-31; POSNER, *supra* note 1, at 2, 5.

42. KAUFMAN TEXT, *supra* note 1, at 27; POLENBERG, *supra* note 1, at 32.

43. KAUFMAN TEXT, *supra* note 1, at 27 ("The newspaper reports of his father's death reminded Ben's teachers and classmates of the corruption associated with the name Cardozo and reinforced his natural shyness.").

44. BURK, *supra* note 21, at 96; SCHOTT & PETERS, *supra* note 29, at 240, 241. At a time when the typical ballplayer frequented saloons and brothels, fought often, gambled a lot, and had little education, *see* RIESS, *supra* note 18, at 160-64, Ward was an anomaly. Wealthy, educated, and refined, he spoke five languages, was a widely-published author, and enlisted early in the civil rights movement. Following his marriage to Helen Dauvray, a beautiful show girl, he also became the undisputed toast of New York City. For a more detailed look at Ward's remarkable life and Hall of Fame career, *see* BASEBALL ROOTS, *supra* note 21, at 278-80; BRYAN DI SALVATORE, A CLEVER BASE-BALLIST: THE LIFE AND TIMES OF JOHN MONTGOMERY WARD (1999); DAVID STEVENS, BASEBALL'S RADICAL FOR ALL SEASONS: A BIOGRAPHY OF JOHN MONTGOMERY WARD (1998).

45. FROMMER, *supra* note 21, at 42.

During the next four years, Ward sparkled on the field, helped the Giants win back-to-back championships in 1888 and 1889, and promoted the union.<sup>46</sup> Meanwhile, Cardozo threw himself into his studies at Columbia. Although he had no real friends, he was widely admired by his classmates, excelled as a member of the debate society, and graduated in 1889 with numerous honors and prizes.<sup>47</sup> Surprisingly, he also took part in the school's freshman-sophomore cane rush, a physically-demanding challenge in which he demonstrated an unexpected ability to hold his own.<sup>48</sup>

As he approached graduation, Cardozo toyed with the idea of studying political economy.<sup>49</sup> Eventually, however, he decided to enter Columbia Law School.<sup>50</sup> It generally is believed Cardozo did so as a first step in atoning for Albert's misdeeds, and that he spent the remainder of his life attempting to wipe away the stain on his family's good name.<sup>51</sup>

In November 1889, as Cardozo was tackling Blackstone's *Commentaries*,<sup>52</sup> Ward turned the baseball world on its ear by announcing the

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46. *Id.* at 43-44; SCHOTT & PETERS, *supra* note 29, at 240-41.

47. KAUFMAN TEXT, *supra* note 1, at 27-39; POLENBERG, *supra* note 1, at 34-38; POSNER, *supra* note 1, at 2.

48. Cardozo's principal biographer has described this event by writing:

[The] "game" [took place] between the freshman and sophomore class [and] the winning class was determined by counting the number of hands from each class on the "cane," which could be anything from a broomstick to a curtain pole, at the end of the prescribed period . . . The rush during Cardozo's freshman year was so violent that one of his classmates was killed. This death led to an official ban, which in reality simply forced the cane rush off campus. Cardozo's hands were among those on the cane at the end of the 1886 rush. Since Cardozo was no athlete, his participation, like that of many of his classmates, probably reflected the social pressure of the student body to join the game. But once he joined, he played it with determination.

KAUFMAN TEXT, *supra* note 1, at 37. For a similar account, see HELLMAN, *supra* note 1, at 27-28.

49. KAUFMAN TEXT, *supra* note 1, at 40.

50. Nevertheless, during his first year of law school Cardozo found time to take classes at Columbia's recently-established School of Political Science, from which he earned a Master of Arts degree in 1890. *Id.* at 45; POLENBERG, *supra* note 1, at 39.

51. KAUFMAN TEXT, *supra* note 1, at 40-41; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 255 (expanded ed. 1988) (explaining Albert's resignation "dishonored the Cardozos and created in his son Benjamin a lifetime mission of restoring the family name."). Despite the existence of substantial circumstantial evidence, this theory is not without its critics. See POLENBERG, *supra* note 1, at 33 ("These assertions, however, depend on a series of unlikely propositions: that Benjamin believed that his father had dishonored the family name, that his own behavior could somehow redeem it, and that it made sense to devote his life to such a purpose."); POSNER, *supra* note 1, at 13 ("It is speculation, not fact, that Cardozo thought it his mission in life to redeem his father's sins . . .").

52. KAUFMAN TEXT, *supra* note 1, at 43 ("Professor George Chase introduced [Cardozo and his fellow] students to the study of law by plunging them into the law according to William Blackstone, the traditional starting point in the education of American lawyers.").

creation of the Players League.<sup>53</sup> Unlike its rivals, Ward pledged his new operation would treat athletes with respect, pay them fair wages, and abstain from such despised practices as “blacklisting” and “classification.”<sup>54</sup> There is no way to know whether Cardozo was aware of what Ward was doing. It is possible, however, that he learned something about the uprising from his colleagues. Given that the law school’s entering class numbered 251,<sup>55</sup> Ward was a prominent alumnus, and the Giants were about to lose their best player to an upstart league, at least some of Cardozo’s peers must have been following what was the biggest sports story of the day.<sup>56</sup>

Despite Ward’s best efforts, the Players League folded after just one season due to a mixture of incompetence, fear, greed, and the hardball tactics of its rivals.<sup>57</sup> In 1891, the American Association did likewise,<sup>58</sup> leaving the National League as the country’s sole major league.<sup>59</sup> For Cardozo, 1891 also was a watershed year. With the law school in turmoil over a radical restructuring of the curriculum and the resignation of most of its faculty, Cardozo decided the time had come for him to move on.<sup>60</sup> As such, he dropped out, took the bar exam, and in the fall went to work with his brother

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53. RADER, *supra* note 21, at 59. Ward and his followers actually had been working on their plan for months, using their free time during the 1889 season to drum up investors and speak with other players. *Id.* at 58-59; see also DANIEL M. PEARSON, *BASEBALL IN 1889: PLAYERS VS. OWNERS* (1993).

54. BURK, *supra* note 21, at 106-07; RIESS, *supra* note 18, at 164.

55. KAUFMAN TEXT, *supra* note 1, at 43.

56. Reflecting the passions Ward had unleashed, newspapers and magazines around the country quickly took sides on the question of whether the members of the Players League were greedy athletes looking to line their pockets at the public’s expense or honest workingmen who had been grossly abused by management. BURK, *supra* note 21, at 107-08; RADER, *supra* note 21, at 60.

57. See *BASEBALL ROOTS*, *supra* note 21, at 57; BURK, *supra* note 21, at 112-15; FROMMER, *supra* note 21, at 46-47; RADER, *supra* note 21, at 60-61; RIESS, *supra* note 18, at 165.

58. Having been severely weakened by its battle with the Players League, the American Association’s owners agreed, somewhat reluctantly, to let the National League absorb four of their franchises and pay \$131,000 to close down the rest. BURK, *supra* note 21, at 121; FROMMER, *supra* note 21, at 54-55; RADER, *supra* note 21, at 62. For an extended examination of the American Association’s rise and fall, see DAVID NEMEC, *THE BEER AND WHISKEY LEAGUE: THE ILLUSTRATED HISTORY OF THE AMERICAN ASSOCIATION—BASEBALL’S RENEGADE MAJOR LEAGUE* (1994).

59. *BASEBALL ROOTS*, *supra* note 21, at 60; SCHOTT & PETERS, *supra* note 29, at 7. Despite its monopoly, the National League limped through the 1890s, burdened by weak teams, heavy debts, low attendance, uneven play, and rowdy behavior on and off the field. FROMMER, *supra* note 21, at 55-56. The absence of competitors, however, did benefit the league in two important respects: It allowed the owners to sharply reduce player salaries and turn the minors into a cheap source of replacements. See BURK, *supra* note 21, at 121-37. For a further look at the National League’s inability to take full advantage of its cartel status following the demise of the American Association, see DAVID QUENTIN VOIGT, *THE LEAGUE THAT FAILED* (1998).

60. KAUFMAN TEXT, *supra* note 1, at 48-49; POLENBERG, *supra* note 1, at 39-42; POSNER, *supra* note 1, at 2.

Albert, Jr. (himself a Columbia Law School graduate) in what had been their father's law firm.<sup>61</sup>

Over the next ten years, as baseball healed its wounds and returned to a state of normalcy, Cardozo set about to find his place at the bar. Unlike other new lawyers of his day, he was given immediate and substantial responsibility; during his first year alone, he argued and won four cases before the Appellate Division of the New York State Supreme Court and recorded a win and a loss at the New York State Court of Appeals.<sup>62</sup> Cardozo soon was recognized as a first-rate appellate advocate and found himself helping more senior lawyers with their cases.<sup>63</sup>

In 1901, the Western League, a minor circuit, became the American League ("AL") and began challenging the National League for players and profits.<sup>64</sup> Following a brief skirmish, the two sides made peace, signed the historic National Agreement (which gave the leagues equal status), and staged the first modern World Series in 1903.<sup>65</sup> That same year, the American League relocated the Baltimore Orioles to New York, where they became the Highlanders.<sup>66</sup> Concurrently, the law firm of Cardozo Brothers merged with Simpson & Werner<sup>67</sup> and Cardozo published his first book, a treatise about the jurisdiction of the New York State Court of Appeals.<sup>68</sup>

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61. KAUFMAN TEXT, *supra* note 1, at 53-54; POLENBERG, *supra* note 1, at 44; POSNER, *supra* note 1, at 2.

62. KAUFMAN TEXT, *supra* note 1, at 55. Cardozo's victory at the court of appeals came in *Govin v. De Miranda*, 30 N.E. 1149 (N.Y. 1892), a matrimonial matter, while his defeat arose from *Frank v. Davis*, 31 N.E. 1100 (N.Y. 1892), a mortgage foreclosure action. After his argument in *Govin*, "the Chief Judge singled him out . . . and congratulated him on his able presentation of the case." POLLARD, *supra* note 1, at 10.

63. KAUFMAN TEXT, *supra* note 1, at 58 ("Other lawyers began to refer cases to Cardozo even in the early period of his practice, and these cases show that he was already a skillful lawyer."); POLENBERG, *supra* note 1, at 45 ("So well researched and elegantly written were his briefs that other lawyers sought his assistance in preparing their appeals, thus earning him the sobriquet 'the lawyers' lawyer.'"); POLLARD, *supra* note 1, at 10 ("After this early success in the high court, he became more and more in demand by busy lawyers who engaged him to argue their appeals for them."). For a further look at Cardozo's career as a practicing lawyer, see Hyman, *supra* note 1, at 3-28.

64. BASEBALL ROOTS, *supra* note 21, at 62; BURK, *supra* note 21, at 137-55; FROMMER, *supra* note 21, at 57-60; RADER, *supra* note 21, at 69-80.

65. BASEBALL ROOTS, *supra* note 21, at 63; BURK, *supra* note 21, at 155-57; FROMMER, *supra* note 21, at 60; RADER, *supra* note 21, at 80-81; TOTAL BASEBALL, *supra* note 24, at 4, 280.

66. See DEREK GENTILE, THE COMPLETE NEW YORK YANKEES: THE TOTAL ENCYCLOPEDIA OF THE TEAM 11-12 (2001). The Highlanders' clumsy name resulted from the fact that upon moving to New York, the team built its new ball park at 168th Street and Broadway, at the time the highest point in Manhattan. *Id.*

67. KAUFMAN TEXT, *supra* note 1, at 84; POLENBERG, *supra* note 1, at 44.

68. See BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (1st ed. 1903, 2d ed. 1909). Not surprisingly, Cardozo's lucid text was quickly

In the fall of 1905, the Giants won the World Series by defeating the Philadelphia Athletics in five games.<sup>69</sup> Cardozo also was doing well:

At the beginning of 1906, Benjamin Cardozo was thirty-five years old. As successful as he had already been, his career now took a notable leap forward. His court of appeals caseload quadrupled. His circle of forwarding lawyers expanded. He handled more varied and interesting cases. His reputation increased, and Attorney General Wickersham offered him an appointment as a federal district judge.<sup>70</sup>

In January 1909, Albert, Jr. died of congestive heart failure at the age of fifty-one.<sup>71</sup> His passing was the first of several major changes at the firm of Simpson, Werner & Cardozo: a move to new quarters; the resignation (under a cloud of suspicion) of Louis Werner in 1911; the elevation of George H. Engelhard to partner in 1912; and, in 1913, the retirement of Angel J. Simpson and the restyling of the operation as Cardozo and Engelhard.<sup>72</sup> Also changing identities in 1913 were the Highlanders, who henceforth would be known as the Yankees.<sup>73</sup>

During the season most New Yorkers found themselves rooting for the Giants, who over the winter had signed Jim Thorpe, the hero of the 1912 Summer Olympics.<sup>74</sup> Although Thorpe turned out to be a disappointment,<sup>75</sup> the Giants easily won their third pennant in a row with a 101-51 record.<sup>76</sup> In the American League, the Yankees continued to be dreadful (despite their new name) and finished 57-94, a woeful seventh.<sup>77</sup> Having lost the previous two World Series,<sup>78</sup> the Giants hoped to do better against the Philadelphia Athletics but succumbed in five games.<sup>79</sup>

That summer, as the Giants were rolling over the rest of the National

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embraced by the practicing bar and deemed definitive by the bench, thus adding to his already considerable professional standing. KAUFMAN TEXT, *supra* note 1, at 89-92; POLENBERG, *supra* note 1, at 48-49; POSNER, *supra* note 1, at 2.

69. TOTAL BASEBALL, *supra* note 24, at 281.

70. KAUFMAN TEXT, *supra* note 1, at 93 (footnote omitted).

71. *Id.* at 103; POLENBERG, *supra* note 1, at 45.

72. KAUFMAN TEXT, *supra* note 1, at 103; POLENBERG, *supra* note 1, at 44.

73. PETER FILICHIA, PROFESSIONAL BASEBALL FRANCHISES: FROM THE ABBEVILLE ATHLETICS TO THE ZANESVILLE INDIANS 162 (1993).

74. ROBERT W. WHEELER, JIM THORPE: WORLD'S GREATEST ATHLETE 99-113, 153-56 (rev. ed. 1979).

75. *Id.* at 156-66; *see also* SCHOTT & PETERS, *supra* note 29, at 234-35.

76. SCHOTT & PETERS, *supra* note 29, at 20-21.

77. TOTAL BASEBALL, *supra* note 24, at 2109.

78. *Id.* at 287-88.

79. *Id.* at 289.

League, the Democratic Party began putting together its slate for the upcoming election. When it was decided a Jew was needed to balance the ticket, Cardozo was nominated for a seat on the New York State Supreme Court.<sup>80</sup> In November, after a low-key campaign in which his last name may have helped Cardozo carry the city's sizeable Italian community, he eked out a razor-thin victory, beating his opponent by just 2264 votes.<sup>81</sup>

Cardozo assumed the bench in January 1914.<sup>82</sup> Five weeks later, he was designated by Governor Martin H. Glynn as a temporary judge of the New York State Court of Appeals to help with its backlog of cases.<sup>83</sup> He would remain in Albany for the next eighteen years, become Chief Judge in 1927,<sup>84</sup> and in 1932 be called to Washington to join the United States Supreme Court.<sup>85</sup>

## II. MIDDLE INNINGS

During his many years in practice, Cardozo did not handle a single baseball case.<sup>86</sup> Nor did he hear any in his first three years on the bench.<sup>87</sup>

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80. KAUFMAN TEXT, *supra* note 1, at 117-20; POLENBERG, *supra* note 1, at 49-50; POSNER, *supra* note 1, at 2-3.

81. KAUFMAN TEXT, *supra* note 1, at 120-25; POLENBERG, *supra* note 1, at 50-51; POSNER, *supra* note 1, at 3.

82. KAUFMAN TEXT, *supra* note 1, at 127; POLENBERG, *supra* note 1, at 51.

83. KAUFMAN TEXT, *supra* note 1, at 127-29; POLENBERG, *supra* note 1, at 51-52; POSNER, *supra* note 1, at 3. As these sources explain, Glynn was authorized to brevet up to four Supreme Court justices to the court of appeals. This practice came to an end in 1923 when the court finally became current in its work. KAUFMAN TEXT, *supra* note 1, at 132, 136-37. For a year-by-year listing of the court's composition, see NEW YORK STATE COURT OF APPEALS, "THERE SHALL BE A COURT OF APPEALS . . ." (1997) [hereinafter COURT HISTORY], available at <http://www.courts.state.ny.us/title.htm> (last visited July 4, 2001).

Cardozo was not Glynn's first choice for a temporary slot. Glynn initially offered the job to Justice Samuel Greenbaum, who turned it down for financial reasons. See KAUFMAN TEXT, *supra* note 1, at 127-28 (explaining that whereas court of appeals judges earned \$13,700, Supreme Court justices in New York City like Greenbaum were paid \$17,500).

84. KAUFMAN TEXT, *supra* note 1, at 182; POLENBERG, *supra* note 1, at 121-22; POSNER, *supra* note 1, at 3.

85. KAUFMAN TEXT, *supra* note 1, at 471; POLENBERG, *supra* note 1, at 170; POSNER, *supra* note 1, at 3.

86. This conclusion is based on a detailed review of the sources cited *supra* notes 1 and 21 as well as numerous LEXIS and WESTLAW searches conducted by the authors in June 2001. It is possible, of course, that Cardozo had a client who was involved in baseball and there simply is no surviving record of their association. If so, the most likely candidate would appear to be Andrew C. Freedman—real estate magnate, builder of the New York City subway system, and owner of the New York Giants from 1895 to 1902. PETER S. HORVITZ & JOACHIM HORVITZ, *THE BIG BOOK OF JEWISH BASEBALL: AN ILLUSTRATED ENCYCLOPEDIA & ANECDOTAL HISTORY* 216 (2001); POSTAL, *supra* note 2, at 29-30; RIESS, *supra* note 18, at 72-75; SCHOTT & PETERS, *supra* note 29, at 83-85.

Finally, however, in 1917 a dispute entitled *Baseball Players' Fraternity, Inc. v. Boston American League Baseball Club*<sup>88</sup> reached the court of appeals.

In September 1911, Casey Hageman was a rookie with the Boston Red Sox. He had begun the season with the Denver Grizzlies, playing Class A ball, but had been called up by the Red Sox just before the season ended.<sup>89</sup> Despite losing both his starts,<sup>90</sup> he had shown promise and was signed for 1912 at a salary of \$400 per month.<sup>91</sup>

The 1911 Red Sox were a mediocre team; their 78-75 finish had landed them in fifth place, twenty-four games out of contention.<sup>92</sup> But in 1912, they christened a new stadium (Fenway Park) and then caught fire behind pitcher Smokey Joe Wood (34-5, 1.91 earned run average) and outfielder Tris Speaker (.383 batting average, league leader in doubles, home runs, and on-base

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As these sources point out, Freedman, like Cardozo, was a Jew, a Democrat, a bachelor, and law-trained. Unlike Cardozo, however, Freedman was arrogant, selfish, dishonest, and obnoxious. While Cardozo undoubtedly would have detested Freedman on a personal level, he would have been eager to have him as a client because of what his business would have meant to Cardozo's firm: invaluable publicity, large fees, challenging work, and lucrative referrals. This would have been quite a step up for Cardozo, whose practice otherwise "involved the ordinary business and personal affairs of middle-class New York, not the litigation or the financing of large corporations." KAUFMAN TEXT, *supra* note 1, at 98. In return, Freedman would have benefited by having at his disposal one of the city's most experienced real property lawyers. See POLENBERG, *supra* note 1, at 48 (explaining Cardozo mostly handled suits involving foreclosures, leases, and title marketability). There is one aspect of Freedman's character Cardozo would have found attractive: his unflinching willingness to stand up to anti-Semites like outfielder Ducky Holmes. During a game in 1898, Holmes, previously a Giant but now with the Baltimore Orioles, had responded to the taunts of his former teammates by yelling, "Well, I'm glad I'm not working for a sheeny anymore." Freedman immediately demanded Holmes be kicked out of the game. When the umpire refused, claiming he had heard nothing, Freedman ordered the Giants off the field, forfeited the match, and returned the fans' money. Although the league fined Freedman, it also suspended Holmes for ten games. RIESS, *supra* note 18, at 73. For Cardozo, who more than once was forced to deal with anti-Semitism, see KAUFMAN TEXT, *supra* note 1, at 169-71, 188, 479-80, 487-89, this courageous and very public act would have made it easier to overlook Freedman's numerous failings.

87. In *Junkermann v. Tilyou Realty Co.*, 108 N.E. 190, 191-92 (N.Y. 1915), however, Cardozo, writing for a unanimous court in a case involving injuries to a spectator at a baby parade, cited and briefly discussed *Lusk v. Peck*, 116 N.Y.S. 1051 (App. Div. 1909), which had awarded damages for the collapse of a baseball grandstand.

88. 117 N.E. 1061 (N.Y. 1917), *aff'd mem.*, 151 N.Y.S. 557 (App. Div. 1915).

89. 151 N.Y.S. at 559. The Appellate Division's decision only refers to "the Denver Club of the Western League," see *id.* at 558, but the leading work on team histories indicates Denver's Western League team was called the Grizzlies from its founding in 1900 to 1911, was known as both the Grizzlies and the Bears in 1912, played just as the Bears from 1913 to 1917, and disbanded prior to the 1918 season. See FILICHA, *supra* note 73, at 59-60.

90. See TOTAL BASEBALL, *supra* note 24, at 1498.

91. 151 N.Y.S. at 558.

92. TOTAL BASEBALL, *supra* note 24, at 2105.



percentage).<sup>93</sup> After romping to the American League pennant with a 105-47 record, they narrowly got by the Giants to bring home their second world championship.<sup>94</sup>

Unfortunately for Hageman, he was not around to enjoy these accomplishments. In just 1 1/3 innings that spring, he surrendered 5 hits, 3 walks, and 5 runs, for a whopping 27.00 earned run average.<sup>95</sup> Given his terrible start, the Red Sox decided Hageman needed more time in the minors and on May 15 optioned him to the Jersey City Skeeters of the Class AA International League.<sup>96</sup> To bolster his confidence, the team assured Hageman the demotion was only to help the Skeeters and that he would return in six to eight weeks.<sup>97</sup>

Hageman's stay with Jersey City did turn out to be brief—on June 23 he was informed by the club's secretary that he was being returned to Denver, where his monthly salary would be \$250.<sup>98</sup> Upon receiving this news, Hageman contacted the Red Sox and insisted they either recall or release him.<sup>99</sup> When his demands were rejected, Hageman sat out the rest of the year and turned for help to his union, the Fraternity of Professional Baseball Players of America.<sup>100</sup>

The Fraternity responded by filing a lawsuit on Hageman's behalf against the Red Sox in New York State Supreme Court,<sup>101</sup> but the complaint was dismissed in an unpublished opinion on the ground that, by signing with Jersey City, Hageman had voided his pact with the Red Sox.<sup>102</sup>

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93. *Id.* at 17, 113, 2107.

94. *Id.* at 288, 2107.

95. *Id.* at 1498.

96. *Baseball Players'*, 151 N.Y.S. at 560. Although the opinion again refers only to the "Jersey City Club," *see id.* at 558, it is clear the team in question was the Jersey City Skeeters. *See* FILICHIA, *supra* note 73, at 110. As Filichia explains, the Skeeters were formed (along with the International League) in 1912 but disbanded after the 1915 season. *Id.*

97. 151 N.Y.S. at 560-61.

98. *Id.* at 561.

99. *Id.* at 561-62.

100. *Id.* at 562-63. The Fraternity had been organized in September 1912 under the leadership of David Fultz, a former baseball player who held a law degree from New York University and had a Wall Street practice, and quickly signed up more than 700 major and minor leaguers. BURK, *supra* note 21, at 188-89; RADER, *supra* note 21, at 101. In return for their eighteen dollars in annual dues, members were promised protection from abuses, financial assistance in times of need, and advice; the Fraternity also pledged to promote professional pride and eradicate rowdiness. BURK, *supra* note 21, at 188.

101. Between 1913 and 1915, the Fraternity also filed actions for a number of other players. RADER, *supra* note 21, at 101. Because it had been chartered as a New York state corporation, BURK, *supra* note 21, at 188, venue in New York was proper.

102. 151 N.Y.S. at 558.

In February 1915, the Appellate Division reversed the Supreme Court in a 3-2 ruling that produced three strikingly different opinions.<sup>103</sup> Justice Laughlin, writing for himself and Justice Hotchkiss, concluded that the complaint should be reinstated because the Red Sox had neglected to put Hageman on waivers, as required by Rule 34 of the National Agreement.<sup>104</sup> This failure meant Hageman had remained under contract to the Red Sox and prohibited the team from sending him back to the minor leagues.<sup>105</sup>

Although he agreed with the majority's result, Presiding Justice Ingraham felt that the Red Sox's refusal to release Hageman after his dismissal by Jersey City proved the Red Sox viewed their contract with Hageman as still effective.<sup>106</sup> As such, the team was obligated to pay him for the remainder of the season at the agreed rate of \$400 per month.<sup>107</sup>

The third opinion was a dissent from Justice McLaughlin, which was joined by Justice Dowling. Rule 31 of the National Agreement required contracts like the one between Hageman and Jersey City to be submitted to baseball's National Commission; if they were not, the Rule treated the major league club as having permanently given up its rights to the player.<sup>108</sup> Because Hageman's contract had not been forwarded to the Commission, the dissenters believed the trial judge had been correct in declaring Hageman had no claim against the Red Sox.<sup>109</sup>

The reinstatement of the Fraternity's complaint threatened every team in the majors. Not only did it bolster the union and call into question the entire (one-sided) relationship between management and labor, it came at a time when the owners were desperately trying to stave off the insurgent Federal League, which had emerged as a major league in 1913.<sup>110</sup> The Red Sox therefore found themselves with little choice but to take the case to the New York State Court of Appeals.

In light of the foregoing, one would have expected the controversy to generate an elaborate opinion from Cardozo, who already was regarded as the court's star.<sup>111</sup> Moreover, in 1917 Cardozo was deeply immersed in contract

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103. *Id.* at 557.

104. *Id.* at 562-63.

105. *Id.* at 563.

106. *Id.* at 564-65.

107. 151 N.Y.S. at 565.

108. *Id.* at 565-66.

109. *Id.* at 566.

110. For a nice analysis of the disparate threats posed by the Fraternity and the Federal League, as well as the relationship between the two organizations, see BURK, *supra* note 21, at 178-209.

111. KAUFMAN TEXT, *supra* note 1, at 164; POSNER, *supra* note 1, at 3.

law, issuing two of his three most important pronouncements on the subject: *De Cicco v. Schweizer*<sup>112</sup> and *Wood v. Lucy, Lady Duff-Gordon*.<sup>113</sup>

There were a number of other reasons why the case appeared ripe for extended treatment. First, whereas baseball had been just an amusing diversion at the time of Cardozo's birth, it was now an enormous financial enterprise with a following of millions.<sup>114</sup> Furthermore, the country's recent entry into World War I was giving baseball unprecedented opportunities to curry favor with the public by holding elaborate patriotic displays.<sup>115</sup>

Second, the underlying facts involved an uncommon mix of written, oral, and unspoken promises. To begin with, there were the signed contracts between Hageman and the teams, as well as the provisions of the National Agreement, which bound all three. Next, there was the Red Sox's verbal assurance that they would recall Hageman in six to eight weeks, which Hageman claimed had induced him to accept the demotion. Lastly, there was the tacit understanding between the Red Sox and their counterparts as to how and when the waiver system would operate.

Third, the dispute was essentially a blank check—the record was missing several key pieces of evidence<sup>116</sup> and the lone case referred to by the Appellate Division, which appeared in Justice McLaughlin's dissent, was factually distinguishable.<sup>117</sup>

In light of these circumstances, it must have come as a shock when the court summarily disposed of the matter by issuing a one sentence per curiam

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112. 117 N.E. 807 (N.Y. 1917).

113. 118 N.E. 214 (N.Y. 1917).

114. In 1871, for example, major league baseball's total annual attendance had been just 266,500. By 1917, the number had grown to 5,219,994, an increase of nearly 2000%. TOTAL BASEBALL, *supra* note 24, at 74-75.

115. Thus, for example, teams staged "preparedness" drills using baseball bats as rifles, held benefit games for military dependents, provided free tickets to servicemen, urged their star players to volunteer as Liberty Loan spokesmen, and sponsored victory parades before and after games. BURK, *supra* note 21, at 216-17; RADER, *supra* note 21, at 101-02.

116. See *Baseball Players'*, 151 N.Y.S. at 561-62 (listing the following items as being unavailable on appeal: a statement by the secretary of the Skeeters to Hageman, a wire from Hageman to the Red Sox, a telegram from Hageman to the National Commission, and a letter from the National Commission to Hageman).

117. In *Griffin v. Brooklyn Ball Club*, 73 N.Y.S. 864 (App. Div. 1902), *aff'd*, 66 N.E. 1109 (N.Y. 1903) (the case cited by Justice McLaughlin, *see* 151 N.Y.S. at 565), the plaintiff, Michael Griffin, sued the Brooklyn Superbas for unpaid wages. The Superbas sought to have the case dismissed on the ground they had assigned the contract, first to the Cleveland Spiders and then to the St. Louis Perfectos, but this argument was rejected because Griffin had never reached a deal with either transferee. (Following the previously-mentioned convention, *see supra* notes 89 and 96, the opinion in *Griffin* does not actually use the teams' names. But because it gives the cities, the year (1899), and the league (National), identification is easy. *See* FILICHIA, *supra* note 73, at 30, 47, 202.)

affirmance.<sup>118</sup> Why it did so is uncertain, although several thoughts come to mind.

Initially, it should be remembered that in 1917 the court was terribly behind in its work.<sup>119</sup> Thus, only a handful of cases could receive full opinions. Even after the court caught up in 1923, full opinions remained the exception rather than the rule.<sup>120</sup>

On the day the *Baseball Players'* decision was released, November 13, the court handed down thirty-five other judgments.<sup>121</sup> Of these, ten were full opinions: two each by Cardozo<sup>122</sup> and Judges Collin<sup>123</sup> and McLaughlin,<sup>124</sup> and one each by Chief Judge Hiscock<sup>125</sup> and Judges Andrews,<sup>126</sup> Chase,<sup>127</sup> and Crane.<sup>128</sup>

Consideration of these cases was not the only matter occupying Cardozo. In January 1917, he had agreed to resign from the New York State Supreme Court so as to be able to run for a regular seat on the court of appeals.<sup>129</sup> Cardozo had taken this step reluctantly and only at the urging of others,<sup>130</sup> and he was quite concerned about how he would fare. In 1916, he had watched both Charles Evans Hughes and Samuel Seabury lose elections after resigning from, respectively, the United States Supreme Court and the New York State Court of Appeals.<sup>131</sup> Their defeats had left Cardozo with a sense of dread

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118. *Baseball Players'*, 117 N.E. at 1061. With the complaint now reinstated, the parties trooped back to the trial court and Hageman eventually prevailed, although not without a struggle: "After five years, Hageman finally won a judgment in a New York appellate court for \$2,348.56 but collected it only after Boston owner Harry Frazee faced a contempt citation if he did not pay up." BURK, *supra* note 21, at 193.

119. See *supra* note 83 and accompanying text.

120. KAUFMAN TEXT, *supra* note 1, at 166 ("In eighteen years of service on the Court of Appeals, Cardozo considered 8,415 cases . . . Of these, 2,822 were decided with full opinions, and 5,593 were memoranda decisions, that is, decisions issued without an opinion or with only a short explanation.").

121. This number is derived from various LEXIS and WESTLAW searches conducted by the authors in June 2001.

122. *De Cicco*, 117 N.E. at 807; *Turner v. Woolworth*, 117 N.E. 814 (N.Y. 1917).

123. *McLean v. Studebaker Bros. Co. of New York*, 117 N.E. 951 (N.Y. 1917); *Plass v. Cent. New Eng. Ry. Co.*, 117 N.E. 952 (N.Y. 1917).

124. *Buckles v. State*, 117 N.E. 811 (N.Y. 1917); *White v. Schweitzer*, 117 N.E. 941 (N.Y. 1917).

125. *Mayer v. Monzo*, 117 N.E. 948 (N.Y. 1917).

126. *Ettlinger v. Nat'l Sur. Co.*, 117 N.E. 945 (N.Y. 1917).

127. *Klein v. Prudential Ins. Co. of Am.*, 117 N.E. 942 (N.Y. 1917).

128. *In re Colegrove's Estate*, 117 N.E. 813 (N.Y. 1917).

129. KAUFMAN TEXT, *supra* note 1, at 163-64; POLENBERG, *supra* note 1, at 120.

130. KAUFMAN TEXT, *supra* note 1, at 163-64; POLENBERG, *supra* note 1, at 120.

131. KAUFMAN TEXT, *supra* note 1, at 163 (explaining that Hughes bowed to Woodrow Wilson in the presidential race and Seabury had his bid to become New York State governor thwarted by

about his own electoral prospects.<sup>132</sup> That his election in 1913 to the New York State Supreme Court had been by the slimmest of margins<sup>133</sup> did nothing to boost his confidence.

Another wrinkle in the election was Cardozo's new colleague, Chester B. McLaughlin. As explained above, when *Baseball Players'* had been before the Appellate Division in 1915, McLaughlin had authored the dissent.<sup>134</sup> In January 1917, with Judge Hiscock moving up to Chief Judge, McLaughlin received an interim appointment to the court of appeals.<sup>135</sup> Because he was a Republican and Cardozo was a Democrat, the state's power brokers had decided the two men should "run together" for regular seats on the court of appeals.<sup>136</sup> With the election being held on November 6, 1917,<sup>137</sup> it is quite possible Cardozo saw no reason to risk an unpleasant confrontation over Casey Hageman with his temporary political twin.<sup>138</sup>

Cardozo also may have decided not to write in *Baseball Players'* because by then he was working on his opinion in *Wood*, which would be released on December 4, 1917.<sup>139</sup> Given his breathtaking overhaul of consideration in *De Cicco*,<sup>140</sup> followed within just a few weeks by his wholesale remaking of promise in *Wood*,<sup>141</sup> perhaps Cardozo lacked the time to contemplate the numerous issues raised by Hageman's situation.<sup>142</sup>

Yet another possibility is that Cardozo felt constrained by the court of appeals' unusual random assignment system, which distributed cases *before* rather than after oral argument.<sup>143</sup> If Cardozo did not draw *Baseball Players'*

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Charles S. Whitman).

132. *Id.*

133. See *supra* note 81 and accompanying text.

134. See *supra* notes 108-09 and accompanying text.

135. See COURT HISTORY, *supra* note 83.

136. KAUFMAN TEXT, *supra* note 1, at 164; POLENBERG, *supra* note 1, at 120.

137. See COURT HISTORY, *supra* note 83.

138. Subsequently, however, Cardozo felt no such hesitation and publicly clashed with McLaughlin in both 1920 and 1921. See KAUFMAN TEXT, *supra* note 1, at 167. But see LEVY, *supra* note 1, at 6 (describing the overall relationship between Cardozo and McLaughlin as good despite their differences).

139. *Wood*, 118 N.E. at 214.

140. KAUFMAN TEXT, *supra* note 1, at 324-29; POSNER, *supra* note 1, at 99.

141. KAUFMAN TEXT, *supra* note 1, at 316-18; POSNER, *supra* note 1, at 92-97.

142. That Cardozo was working at a feverish pace during this period is made clear by the statistics in William H. Manz, *Cardozo's Use of Authority: An Empirical Study*, 32 CAL. W. L. REV. 31, 72-74 (1995) (showing between 1914 and 1921 Cardozo was the busiest member of the court of appeals, writing far more opinions than any of his colleagues).

143. KAUFMAN TEXT, *supra* note 1, at 132; POLENBERG, *supra* note 1, at 71; POSNER, *supra* note 1, at 145-47.

(and we have no way of knowing whether he did), he would have been forced to express his views in either a concurrence or a dissent, something which was discouraged and which Cardozo did only on rare occasions.<sup>144</sup>

In the end, the explanation may be much simpler. Being highly pragmatic,<sup>145</sup> Cardozo probably looked at *Baseball Players'* and decided it had nothing to offer him, especially in light of the confused state of the record and baseball's atypical operating structure, which meant any decision would have only limited precedential value.<sup>146</sup> Additionally—although probably beyond Cardozo's ken—by 1917 Hageman had been out of baseball for three years,<sup>147</sup> the Federal League had disappeared,<sup>148</sup> and the Fraternity was on the verge of folding.<sup>149</sup>

Following *Baseball Players'*, Cardozo served another fifteen years on the court of appeals. During this long period, only one more baseball case came before him. In December 1931, just a few months before Cardozo resigned his seat, the court ruled in *People's Broadcasting Corp. v. George Batten Co.*<sup>150</sup>

A New York City radio station with the call letters WPCH had purchased from the George Batten Company ("GBC"), an advertising agency, the broadcast rights to the 1927 home games of the Giants and the Yankees.<sup>151</sup> As

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144. KAUFMAN TEXT, *supra* note 1, at 166. According to Kaufman, of the 5593 cases like *Baseball Players'* that were decided by memorandum opinion, Cardozo dissented in 198 of them. *Id.* This works out to just 3.5%.

145. *Id.* at 112; LEVY, *supra* note 1, at 25; POLENBERG, *supra* note 1, at 248; POSNER, *supra* note 1, at 9, 28. As these sources make clear, Cardozo spent his entire life searching for the middle ground and owed much of his success, as both a lawyer and a judge, to his lack of strong views.

146. Although the United States Supreme Court would not issue baseball its notorious free pass until 1922, *see infra* notes 215-17 and accompanying text, the view that baseball should not be held to ordinary commercial standards already had gained a fair amount of acceptance, as witnessed by District Judge Landis's famous remark in 1915 that baseball was "a national institution" rather than a capitalistic endeavor. BURK, *supra* note 21, at 206; RADER, *supra* note 21, at 109.

147. *See* TOTAL BASEBALL, *supra* note 24, at 1498 (indicating Hageman's last season was 1914, when he went 3-5 and posted a 2.91 earned run average while playing for the Chicago Cubs and the St. Louis Cardinals).

148. Unable to compete at the gate, and stymied in its attempt to collect antitrust damages, the Federal League had folded in December 1915 following the signing of a "peace treaty" under which "the [major leagues] bought out the Federal League for \$600,000 and amalgamated two of its franchises with existing clubs while jettisoning the rest." BURK, *supra* note 21, at 208. Because they were the only ones not taken care of, the owners of the Baltimore Terrapins filed their own antitrust case against baseball in 1916. *Id.* at 209; FILICHIA, *supra* note 73, at 15. As explained *supra* note 146, the case eventually reached the United States Supreme Court, where it was determined baseball was not amenable to such suits.

149. While the Fraternity did not actually close up shop until 1918, it had ceased being a force in February 1917, when its plans for a massive player walkout fizzled. BURK, *supra* note 21, at 212-16.

150. 180 N.E. 328 (N.Y. 1931), *aff'd mem.*, 247 N.Y.S. 569 (App. Div. 1931).

151. 247 N.Y.S. at 570-71.

it happened, that year was one of the most exciting in baseball history.

After getting off to a slow start, the Giants, led by their three big stars—Rogers Hornsby, Mel Ott, and Bill Terry—rallied and found themselves in a fierce battle for the pennant with the Pittsburgh Pirates and the St. Louis Cardinals.<sup>152</sup> Ultimately, however, their 92-62 record was good enough only for third place, two games behind the Pirates.<sup>153</sup>

The Yankees, on the other hand, powered by the legendary “Murderers’ Row” of Earle Combs, Babe Ruth, Lou Gehrig, Bob Meusel, and Tony Lazzeri, quickly ran away from everyone.<sup>154</sup> Their 110 wins eclipsed the old American League mark while Ruth’s 60 home runs was a new major league record.<sup>155</sup> In the World Series, Ruth hit two more home runs as the Yankees swept the Pirates in four games.<sup>156</sup>

Regrettably, not one of these thrilling moments was heard on WPCB. Just before the season began, the station discovered GBC did not own the rights it had sold.<sup>157</sup> When it subsequently attempted to make a deal with the Yankees directly, the team refused.<sup>158</sup>

152. SCHOTT & PETERS, *supra* note 29, at 33.

153. *Id.*

154. The 1927 Yankees are considered by many to be the greatest team in baseball history. TOTAL BASEBALL, *supra* note 24, at 44. For a day-by-day account of their exploits, see G.H. FLEMING, MURDERERS’ ROW (1985).

155. DAVID S. NEFT ET AL., THE SPORTS ENCYCLOPEDIA: BASEBALL 56, 152 (21st ed. 2001).

156. TOTAL BASEBALL, *supra* note 24, at 303.

157. *People’s Broad. Corp.*, 247 N.Y.S. at 571.

158. *Id.* Neither the Yankees nor the Giants authorized radio broadcasts of their home games until 1939, long after other major league teams had recognized the medium’s profit potential. See Michael Chamberlain, *Baseball on the Air: Reinterpretations of the History of Radio Baseball* 17, 48-49, 63-67 (1996) (unpublished M.A. thesis, Concordia University) (on file with the authors). It is more than a little ironic that New York became the last city to receive regular baseball broadcasts, given its status as the communications capital of the world, the country’s largest media market, and the place where the first network broadcast of a World Series game had occurred (a 3-0 Yankees win against the Giants at the Polo Grounds on October 5, 1921). *Id.* at 17, 48, 67; TOTAL BASEBALL, *supra* note 24, at 297. Yet one need not look far for the reasons why:

Up to 1934, the ban on broadcasting in New York was informal, but in 1934, the Yankees, Giants, and Dodgers banned all radio, including out-of-town re-creations, from their parks for a period of five years. The ban was instigated by the New York Yankees, whose owner, Jacob Ruppert, remained unconvinced of radio’s contribution to home attendance until his death. Horace Stoneham of the Giants was no fan of radio himself, and the Brooklyn ownership was in disarray, with two feuding ownership factions each controlling exactly 50 per cent of the stock, and they just went along with what the other two clubs did . . . [I]n 1937 National League officials asked [baseball promoter Larry] MacPhail, who was unemployed after a falling out with Reds’ owner Powel Crosley, to step into the situation in Brooklyn, where the Dodgers were facing bankruptcy . . . . The Dodgers’ directors reluctantly agreed to MacPhail’s conditions: MacPhail was given “full and complete authority” over the team, with a salary that was tied to the Dodgers’ attendance. Besides cleaning up and installing lights at Brooklyn’s Ebbets Field and making some player moves, MacPhail announced in late 1938 that he would not renew the radio ban in

Having neither the Giants nor the Yankees was a major blow for WPCB, which had begun broadcasting in 1924 as WFBH, a daytime-only station.<sup>159</sup> After three years, WPCB still lacked a clear identity in the highly competitive New York market; meanwhile, its sister outlet, WMCA, was taking off.<sup>160</sup> Worse still, WPCB was being bounced around the AM dial by the Federal Radio Commission (which was trying to bring some order to the nation's airwaves), thereby making it all but impossible for the station's listeners to find it.<sup>161</sup> Thus, getting the rights to the Giants and the Yankees would have been a tremendous coup for WPCB, and may even have prevented its 1933 demise.<sup>162</sup>

To recover some of what it had lost, the People's Broadcasting Corporation ("PBC"), the owner of WPCB, sued GBC in New York State Supreme Court and won a \$9025 judgment.<sup>163</sup> The Appellate Division reversed and dismissed the complaint because PBC did not hold the federal broadcasting license required by the Radio Act of 1927.<sup>164</sup>

As it happened, a third party known as the Concourse Radio Corporation ("CRC") did have a license to operate WPCB.<sup>165</sup> PBC therefore claimed it had entered into a written contract with CRC under which CRC had either sold or assigned the license to PBC.<sup>166</sup> This argument was rejected when PBC failed to produce the contract.<sup>167</sup> Undeterred, PBC took its case to the court of appeals. Not surprisingly, it affirmed the Appellate Division in a one sentence per curiam opinion.<sup>168</sup>

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Brooklyn imposed by the owners of the Yankees, Giants, and Dodgers . . . [T]here was speculation that the Yankees and Giants might defer instituting broadcasting for the first year of the Brooklyn experiment, to see how it would go . . . [But when] Giants' president Stoneham . . . received an offer of around \$250,000 to permit broadcasts of Giants' games and . . . the Yankees . . . received an offer in the neighborhood of \$200,000 . . . the Yankees and Giants had no choice but to allow their games to be broadcast. When final arrangements by the Giants and Yankees were made, they shared one radio station, WABC, and they broadcast only home games. [In contrast,] 50,000-watt New York station WOR [paid] \$77,000 for exclusive rights to broadcast all Dodgers' home and away games.

Chamberlain, *supra*, at 48-49, 63-66.

159. See Bob Harrison, *Metro New York AM Call Letter History*, at <http://members.aol.com/jeff560/nyam.html> (last visited July 1, 2001).

160. *Id.*

161. *Id.* (explaining that between April and December 1927, the station's transmitting frequency changed from 1100 to 970 to 920, finally coming to rest at 810 in 1928).

162. *Id.*

163. *People's Broad. Corp.*, 247 N.Y.S. at 570.

164. *Id.* at 572-73.

165. *Id.* at 571-72.

166. *Id.* at 572.

167. *Id.*

168. *People's Broad. Corp.*, 180 N.E. at 329.



Cardozo's reticence on this occasion presents no mystery. Without proof it had a federal license, PBC could not legally broadcast any programs, including baseball games, on WPCH.<sup>169</sup> Although the early days of radio were not unlike the Wild West, with little regulation and even less enforcement,<sup>170</sup> Cardozo would have seen no reason to help PBC. In both his personal and professional life, Cardozo firmly believed everyone should play by the rules or suffer the consequences.<sup>171</sup> Thus, while Cardozo was quite willing to help deserving litigants,<sup>172</sup> he most likely viewed PBC as having gotten its just desserts.

*Baseball Players' and People's Broadcasting* were the first and last sports cases Cardozo heard while on the court of appeals, and the only ones touching on baseball. In the intervening years, however, the court handed down other decisions involving bobsledding,<sup>173</sup> boxing,<sup>174</sup> football,<sup>175</sup> and golf.<sup>176</sup> Each time, Cardozo voted with the majority but did not write an opinion.<sup>177</sup>

Based on the foregoing, it is tempting to believe that Cardozo shied away from sports cases. Yet such a conclusion is incorrect. Although Cardozo was

169. *People's Broad. Corp.*, 247 N.Y.S. at 572.

170. Chamberlain, *supra* note 158, at 1; Harrison, *supra* note 159.

171. The idea that people should be forced to lie in the beds they had made for themselves was one of the central themes of Cardozo's life:

Yet Cardozo's entire career illustrated the importance of personal values in the judicial process. In cases involving morality, sexuality, religion, and social order, he was guided by a code of conduct firmly rooted in his early experiences. His rulings depended on a selective reading of both the evidence and the precedents, although Cardozo had a genius for making it seem as if the results he reached were logical, inevitable, and legally unassailable. . . . He therefore exhibited no sympathy for so extraordinarily diverse a group of claimants as Hans Schmidt, an evildoer who sought to hide behind an insanity plea; Louise Hamburger, a wronged student who brought a negligence suit against a university; Robert Dean, Leon Hoadley, and Cosmo Mirizio, husbands who attempted to extricate themselves from unhappy marital situations; Albert Hamilton, a conscientious objector who claimed his religious beliefs should exempt him from military training; and Le Roy J. Miller, Herman Snyder, and Frank Palka, murderers, as Cardozo viewed them, who thought to find legal loopholes to escape the punishment they deserved.

POLENBERG, *supra* note 1, at 247, 249; see also KAUFMAN TEXT, *supra* note 1, at 223 ("He thought that the harsh application of a generally fair rule was the price that we paid for a system of law."); POSNER, *supra* note 1, at 5 ("Cardozo's opinions and extrajudicial writings display a strong streak of moralism."). For a further discussion, see Stanley C. Brubaker, *The Moral Element in Cardozo's Jurisprudence*, 1 CARDOZO L. REV. 229 (1979).

172. See KAUFMAN TEXT, *supra* note 1, at 223-42 (discussing Cardozo's repeated use of equity to achieve justice for individual parties).

173. *Ass'n for the Prot. of the Adirondacks v. MacDonald*, 170 N.E. 902 (N.Y. 1930).

174. *McHugh v. Mulrooney*, 179 N.E. 753 (N.Y. 1932); *Russell v. Nostrand Athletic Club*, 148 N.E. 756 (N.Y. 1925).

175. *Hoepfner v. Dunkirk Printing Co.*, 172 N.E. 139 (N.Y. 1930).

176. *Barrett v. Mamaronck Heights Co.*, 173 N.E. 890 (N.Y. 1930).

177. See cases cited *supra* notes 173-76.

not a sportsman and avoided exercise whenever he could,<sup>178</sup> he was not entirely out of his element when a sports case arose. While not very good at it, he did play golf at the Norwood Country Club in New Jersey, "where he was a member[;]"<sup>179</sup> knowing this, the president of Cornell University once attempted to convince Cardozo to give a lecture at his campus by promising he could spend his spare time "playing golf, or engaging in some other diversion."<sup>180</sup> He also yachted at least once, "even though he did not know how to swim."<sup>181</sup> Thus, Cardozo had at least some familiarity with the sporting life, which he displayed in *Murphy v. Steeplechase Amusement Co.*<sup>182</sup>

On a visit to Coney Island with a group of friends, James Murphy fractured his knee cap on "The Flopper," a moving belt that ran upward on an inclined plane.<sup>183</sup> When he sued the ride's owner for negligence, a jury awarded damages and a divided Appellate Division affirmed.<sup>184</sup> Writing for the majority, Cardozo reversed and ordered a new trial.<sup>185</sup>

The opinion broke no new ground—assumption of the risk had been an established part of New York tort law since at least 1874<sup>186</sup>—but it contains one of Cardozo's most famous lines: "The timorous may stay at home."<sup>187</sup> Over the years, numerous sports injury cases have repeated this admonition.<sup>188</sup>

178. KAUFMAN TEXT, *supra* note 1, at 148-49.

179. *Id.* at 149.

180. POLENBERG, *supra* note 1, at 82.

181. KAUFMAN TEXT, *supra* note 1, at 195.

182. 166 N.E. 173 (N.Y. 1929), *rev'd* 231 N.Y.S. 826 (App. Div. 1928).

183. 166 N.E. at 173-74.

184. *Id.* at 173.

185. *Id.* at 175. Judge O'Brien wrote a one-sentence dissent, *id.*, citing his recent opinion in *Tantillo v. Goldstein Bros. Amusement Co.*, 162 N.E. 82 (N.Y. 1928). In *Tantillo*, the court (including Cardozo) had upheld an award of damages to a theater patron who had been chosen from the audience at random and was injured on a treadmill that was part of the show's act.

186. *See* *Rose v. Boston & Albany R.R. Co.*, 58 N.Y. 217 (N.Y. 1874).

187. 166 N.E. at 174.

188. *See, e.g.*, *Finnern v. Sunday River Skiway Corp.*, 984 F.2d 530, 534 n.5 (1st Cir. 1993) (skiing); *Petition of Binstock*, 213 F. Supp. 909, 915 (S.D.N.Y. 1963) (yachting); *Blades v. Int'l Drag Bike Ass'n*, No. C-3-89-199, 1991 WL 1092503, at \*4 (S.D. Ohio Aug. 16, 1991) (motorcycle racing); *Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424, 428 (D.S.C. 1994) (baseball); *Wright v. Mt. Mansfield Lift, Inc.*, 96 F. Supp. 786, 791 (D. Vt. 1951) (skiing); *Fortier v. Los Rios Cmty. College Dist.*, 52 Cal. Rptr. 2d 812, 814 (Ct. App. 1996) (football); *Tan v. Goddard*, 17 Cal. Rptr. 2d 89, 92 (Ct. App. 1993) (horse racing); *Tavernier v. Maes*, 51 Cal. Rptr. 575, 587 (Ct. App. 1966) (softball); *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 524 (Mich. 1999) (ice skating); *Schmidt v. Youngs*, 544 N.W.2d 743, 745 (Mich. Ct. App. 1996) (golfing); *Morgan v. State*, 685 N.E.2d 202, 210 (N.Y. 1997) (bobsledding, karate, martial arts, and tennis); *Akins v. Glen Falls City Sch. Dist.*, 424 N.E.2d 531, 532-33 (N.Y. 1981) (baseball); *Baker v. Topping*, 222 N.Y.S.2d 658, 659 (App. Div. 1961) (baseball); *Clark v. Goshen Sunday Morning Softball League*, 493 N.Y.S.2d 262, 264 (Sup. Ct. 1985) (softball); *Turcotte v. Fell*, 474 N.Y.S.2d 893, 895 (Sup. Ct. 1984) (horse racing);

## III. LATE INNINGS

In January 1932, Cardozo was beginning his nineteenth year on the New York State Court of Appeals and seemed destined to finish his career there. That month, however, Justice Oliver Wendell Holmes, Jr. retired from the United States Supreme Court and Cardozo was tapped to take his place.<sup>189</sup> After winning quick approval from the Senate, Cardozo was sworn in on March 14, 1932.<sup>190</sup>

Compared to his long service on the court of appeals, Cardozo's tenure on the Supreme Court was rather brief—just six years.<sup>191</sup> In this time, only one sports case came to the Court: *American Baseball Club of Philadelphia v. City of Philadelphia*.<sup>192</sup>

During 1931, the Philadelphia Athletics had gone 107-45, won the American League pennant a third straight time, drawn 627,464 fans, and pushed the St. Louis Cardinals to the limit before finally losing to them in the seventh game of the World Series.<sup>193</sup> Amazingly, on a team loaded with such

Blevins v. France, 93 S.E.2d 549, 555 (N.C. 1956) (auto racing); Bouchard v. Johnson, 555 N.W.2d 81, 86 (N.D. 1996) (skiing); Troop A Riding Acad. v. Miller, 189 N.E. 647, 650 (Ohio 1934) (horseback riding); Ivory v. Cincinnati Baseball Club Co., 14 O.O. 39, 44 (Hamilton County C.P.), *rev'd*, 24 N.E.2d 837 (Ohio App. 1939) (baseball); Vendrell v. Sch. Dist. No. 26C, Malheur County, 376 P.2d 406, 414 (Or. 1962) (football); Hunt v. Portland Baseball Club, 296 P.2d 495, 500 (Or. 1956) (baseball); Taylor v. Churchill Valley Country Club, 228 A.2d 768, 770 n.3 (Pa. 1967) (golfing); Jones v. Three Rivers Mgmt. Corp., 380 A.2d 387, 392 n.1 (Pa. Super. 1977), *rev'd*, 394 A.2d 546 (Pa. 1978) (baseball); Schentzel v. Phila. Nat'l League Club, 96 A.2d 181, 185 (Pa. Super. 1953) (baseball); Perry v. Seattle Sch. Dist. No. 1, 405 P.2d 589, 594 n.6 (Wash. 1965) (football).

189. KAUFMAN TEXT, *supra* note 1, at 455-56, 462-63; POLENBERG, *supra* note 1, at 1; POSNER, *supra* note 1, at 3-4.

190. KAUFMAN TEXT, *supra* note 1, at 469-71; POLENBERG, *supra* note 1, at 169-70.

191. As has been pointed out elsewhere, the brevity of his service, combined with the differences in structure and operation of the two institutions, resulted in Cardozo having only a small impact on the Court:

Whether because Cardozo was the junior member of a court in which cases were not assigned by rotation, or because Chief Justice Hughes hogged a disproportionate number of the best cases for himself, or because Cardozo was frequently in dissent, or because the work or working conditions of the Supreme Court did not suit his temperament, or because many of the issues that preoccupied the Court in the 1930s have proved transitory (but torts and contracts are eternal), or because six years is too short a time for a Supreme Court justice to make his mark (given the exceptional breadth of the Court's jurisdiction and the relatively small number of majority opinions that each justice writes)—and Cardozo did not have a full six years of actual service on the Court, because of his terminal illness—Cardozo did not place a strongly individual imprint on any field of Supreme Court jurisprudence. . . . Cardozo's opinions, both majority and separate, are above the average for Supreme Court opinions, then or now, but they lack the verve and punch of his opinions for the New York Court of Appeals, and a sense of constraint is palpable.

POSNER, *supra* note 1, at 121-22. For a further discussion of Cardozo as a United States Supreme Court Justice, see KAUFMAN TEXT, *supra* note 1, at 472-565.

192. 290 U.S. 595 (1933), *dismissing appeal from* 167 A. 891 (Pa. 1933).

193. TOTAL BASEBALL, *supra* note 24, at 76, 307, 2143-47.

sluggers as Mickey Cochran, Jimmie Foxx, and Al Simmons (whose .390 batting average led the majors),<sup>194</sup> the year belonged to pitcher Lefty Grove, who compiled a 31-4 record, led the league in earned run average (2.06), strikeouts (175), complete games (27), and shutouts (4), and easily won the Most Valuable Player award.<sup>195</sup>

Across town, the Phillies' season had turned out quite differently. Despite having the league's leading home run hitter (Chuck Klein with thirty-one) and winningest pitcher (Jumbo Elliot with nineteen), the team went 66-88, finished sixth, and ended up thirty-five games behind the Cardinals.<sup>196</sup> The club did no better at the gate, where a mere 284,849 fans passed through the turnstiles.<sup>197</sup>

Following the season, the City of Philadelphia passed an ordinance requiring anyone who staged an athletic contest at which an entry fee was charged to purchase a license.<sup>198</sup> The permit's cost would be based on the number of police and firemen needed at the event, as determined by the Director of Public Safety.<sup>199</sup>

In due course, the Athletics received a notice stating that 12 officers, at a rate of \$5.50 per man, would be required for their home games.<sup>200</sup> With the team scheduled to play 77 times at Shibe Park in 1932,<sup>201</sup> the total bill for the season would come to nearly \$5100. A similar notice was sent to the Phillies for their upcoming games.<sup>202</sup>

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194. *Id.* at 2147, 2394.

195. *Id.* at 125, 196, 2147.

196. *Id.* at 2146.

197. *Id.* at 76.

198. *Am. Baseball Club*, 167 A. at 892.

199. *Id.*

200. *Id.*

201. *Id.* Built in 1908-09, enlarged from 20,000 to 33,000 seats in 1925, renamed Connie Mack Stadium in 1954, and demolished in 1976, Shibe Park was the first concrete-and-steel stadium in the majors and served as the home of the Athletics from 1909 to 1954, when the team moved to Kansas City. See BRUCE KUKLICK, *TO EVERY THING A SEASON: SHIBE PARK AND URBAN PHILADELPHIA 1909-1976* (1991); JOSH LEVENTHAL, *TAKE ME OUT TO THE BALLPARK: AN ILLUSTRATED TOUR OF BASEBALL PARKS PAST AND PRESENT* 36-37 (2000); TOTAL BASEBALL, *supra* note 24, at 47-48 (under the heading "Oakland Athletics"); RICH WESTCOTT, *PHILADELPHIA'S OLD BALL PARKS* 99-195 (1996); Robert H. Skilton, *Memories of Shibe Park*, 1992 WIS. L. REV. 1747; *Shibe Park/Connie Mack Stadium*, at <http://www.ballparks.com/baseball/index.htm> (last visited July 2, 2001).

202. 167 A. at 892. Unlike Shibe Park, which was still fairly new and attractive, Baker Bowl, the Phillies' home, was outmoded, run-down, and nearing the end of its existence. Originally built in 1887, it was destroyed in a fire and rebuilt in 1894-95. At its reopening, Baker Bowl (then known as National League Park) was an architectural marvel. Not only was it the first modern ballpark designed specifically for baseball, it was the earliest to be constructed primarily of steel and brick (rather than wood) and to use cantilevered concrete supports, which greatly reduced the number of seats with obstructed views. By 1938, however, Baker Bowl's small size (it held just 18,800 fans), ugly looks, and undesirable location over a railroad tunnel (which had earned it the dubious nickname

Setting aside their mutual animosity, the two clubs banded together and challenged the ordinance in the Philadelphia Court of Common Pleas, where it was struck down in an unpublished decision.<sup>203</sup> Subsequently, the Pennsylvania Supreme Court reversed 6-1 because the ordinance “was clearly within” the city’s police power.<sup>204</sup> Justice Maxey, the lone dissenter, harshly criticized the majority for allowing the Department of Public Safety to wield what he termed “arbitrary and unrestricted power.”<sup>205</sup>

The Pennsylvania Supreme Court issued its decision in June 1933;<sup>206</sup> in the fall, the teams filed a joint appeal with the United States Supreme Court in which they argued the city’s licensing scheme violated substantive due process.<sup>207</sup> Despite whatever merit this argument had, in November the appeal was dismissed “for want of a substantial federal question” in a one sentence per curiam opinion.<sup>208</sup>

It seems likely that Cardozo went along with this decision for three reasons. First, in November 1933, Cardozo had been on the Court for a mere twenty months.<sup>209</sup> He had arrived in Washington with a national reputation, but had achieved his fame as a common law judge. The United States Supreme Court, however, was a constitutional law court where there was little need for, or appreciation of, the common law.<sup>210</sup> Moreover, Cardozo was still trying to win over some of his more conservative brethren, particularly Justice Van Devanter, who fretted that Cardozo was eager to “depart from old

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“the Hump”) had become such serious liabilities that the Phillies were forced to move in with the Athletics at Shibe Park. See LEVENTHAL, *supra* note 201, at 35; WESTCOTT, *supra* note 201, at 27-98; *Baker Bowl*, at <http://www.ballparks.com/baseball/index.htm> (last visited July 2, 2001); Bob Warrington, *Baker Bowl Honored with Historical Marker at Dedication Ceremony!*, at <http://philadelphiaathletics.org/event/baker.html> (last visited July 2, 2001).

203. 167 A. at 892.

204. *Id.* at 895.

205. *Id.*

206. *Id.* at 891.

207. See Appellants’ Statement as to Jurisdiction at 16, *Am. Baseball Club of Philadelphia v. City of Philadelphia*, 290 U.S. 595 (1933) (No. 525) (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). In response, the City of Philadelphia maintained the issue had been waived inasmuch as it had not been brought up until reargument before the Pennsylvania Supreme Court. See Appellees’ Motion to Dismiss and Statement Opposing Jurisdiction at 13-21, *Am. Baseball Club of Phila. v. City of Philadelphia*, 290 U.S. 595 (1933) (No. 525).

208. *Am. Baseball Club*, 290 U.S. at 595.

209. Due to a quirk of fate, Cardozo remained the junior Justice until 1937, when Senator Hugo L. Black replaced Justice Van Devanter. KAUFMAN TEXT, *supra* note 1, at 529. As such, Cardozo rarely received plum assignments and was largely relegated to writing opinions on arcane questions of bankruptcy and tax law. *Id.* at 493.

210. *Id.* at 469; POLENBERG, *supra* note 1, at 171-73.

landmarks and take up with new and uncertain experiments.”<sup>211</sup>

Second, Cardozo undoubtedly viewed the Pennsylvania Supreme Court’s reversal of the trial court as correct. Although “[a]s a student at Columbia, Cardozo had spoken the language of laissez-faire, Social Darwinism, and private property,”<sup>212</sup> on the bench he had become extremely receptive to government regulation. Indeed, in case after case, Cardozo had shown himself willing to uphold just about any type of legislative command so long as an economic rationale could be advanced in its defense.<sup>213</sup> Thus, it is not at all surprising that the ordinance, which was intended to assure public safety while raising money for the city during the Depression,<sup>214</sup> would strike Cardozo as entirely reasonable.

Third, Cardozo probably thought the case did lack a substantial federal nexus in light of *Federal Baseball Club of Baltimore Inc., v. National League of Professional Baseball Clubs*,<sup>215</sup> in which Justice Holmes had held that baseball was a “game” rather than a “business” and as such constituted neither commerce nor an activity subject to the nation’s antitrust laws.<sup>216</sup> These sweeping conclusions are now regarded as being the work of a great judge on a bad day,<sup>217</sup> but in 1933 the decision was still fairly fresh and considered good law. Further, given his unabashed admiration of Holmes, whom he often referred to as “the Master” and whose chair he was now occupying on the Supreme Court,<sup>218</sup> Cardozo almost certainly would have accepted at once its

211. KAUFMAN TEXT, *supra* note 1, at 492.

212. *Id.* at 362.

213. *Id.* at 371 (“Cardozo usually asked only whether the legislative perception of the need for a particular means of regulation was valid.”); POLENBERG, *supra* note 1, at 202-03 (“Taken as a whole, Cardozo’s opinions support the view of the constitutional historian Richard D. Friedman: ‘Nobody on the Court was more consistently hospitable to broad assertions of governmental power to regulate economic matters.’”); POSNER, *supra* note 1, at 122-23 (“Many of Cardozo’s Supreme Court opinions, however, reflect an uncritical acceptance of rationales for New Deal legislation that seem to a modern understanding naive.”).

214. *See Am. Baseball Club*, 167 A. at 892.

215. 259 U.S. 200 (1922).

216. *Id.* at 209 (“[T]he exhibition [of a baseball game], although made for money would not be called trade or commerce in the commonly accepted use of those words.”).

217. In *Salerno v. Am. League of Prof’l Baseball*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied sub nom. Salerno v. Kuhn*, 400 U.S. 1001 (1971), for example, Judge Friendly observed, “We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes’ happiest days . . . .” Of course, much of Justice Holmes’ handiwork was undone by Congress in the Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824 (1999) (codified at 15 U.S.C.A. § 27a (West Supp. 2002)). *See Symposium, The Curt Flood Act*, 9 MARQ. SPORTS L.J. 307 (1999).

218. KAUFMAN TEXT, *supra* note 1, at 152; POLENBERG, *supra* note 1, at 173; POLLARD, *supra* note 1, at 14; POSNER, *supra* note 1, at 139. Abandoning his normal reserve, Cardozo told Holmes in 1928, “I revere and admire you to the point of adoration.” POLENBERG, *supra* note 1, at 173. Holmes returned the compliment by writing in a 1929 letter to Dr. John C.H. Wu, “I tremble lest I should

implied premise that baseball was too trifling a matter to merit federal court review.

#### IV. CARDOZO AND RUTH

Because of his wide-ranging influence, Cardozo has been compared to numerous people;<sup>219</sup> in recent years the list has jumped beyond America's borders to include the English jurist Lord Denning,<sup>220</sup> the French novelist Gustave Flaubert,<sup>221</sup> and the German sociologist Max Weber.<sup>222</sup> Judge Posner, who himself has been likened to Cardozo,<sup>223</sup> has put a baseball spin on the exercise. After lamenting "there are no perfect judges, just as there are no perfect hitters in baseball[.]"<sup>224</sup> he examines Cardozo's lifetime judicial "statistics" with those compiled by Holmes, Brandeis and Learned Hand,<sup>225</sup> and concludes that of the four, Cardozo was the weakest.<sup>226</sup>

Posner's use of baseball to rate Cardozo results in a desire to measure

prove unworthy of his regard." LEVY, *supra* note 1, at 8. For further evidence of Cardozo's devotion to Holmes, see Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682 (1931) (90th birthday tribute).

219. In his Foreword to Joseph Pollard's biography, Dean Roscoe Pound of the Harvard Law School placed Cardozo in the company of such nineteenth century notables as James Kent, John Marshall, and Joseph Story. POLLARD, *supra* note 1, at 1. Most comparisons, however, involve grouping Cardozo with Holmes and Felix Frankfurter, the men who immediately preceded and succeeded him at the Supreme Court, or Louis D. Brandeis, Cardozo's fellow Jew on the Court. Thus, for example, in urging his colleagues to vote in favor of Circuit Judge G. Harrold Carswell, who had been nominated by President Nixon to fill the vacancy caused by Justice Abe Fortas's resignation from the Supreme Court, Senator Roman L. Hruska commented, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters and Cardozos." Warren Weaver Jr., *Carswell Attacked and Defended as Senate Opens Debate on Nomination*, N.Y. TIMES, Mar. 17, 1970, at 21.

220. See Brady Coleman, *Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher*, 32 RUTGERS L.J. 485 (2001). In an article that reaches further back in time, Cardozo is likened to the medieval English jurists Sir Edward Coke and Chief Justice William of Raleigh. See John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119 (1987).

221. See Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979).

222. See John C.P. Goldberg, *The Life of the Law*, 51 STANFORD L. REV. 1419 (1999) (book review of KAUFMAN TEXT, *supra* note 1).

223. See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995).

224. POSNER, *supra* note 1, at 138.

225. *Id.* at 138-42.

226. *Id.* at 142-43 ("[I]n the long run, he was perhaps the least influential of the great judges in changing the direction of the law."). *Id.* at 143. For a scathing criticism of Posner's reading of Cardozo's numbers, see James D. Gordon III, *Cardozo's Baseball Card*, 44 STANFORD L. REV. 899 (1992).

Cardozo against an actual baseball player. And that, in turn, leads to Babe Ruth.<sup>227</sup> For like Cardozo, Ruth strode onto the national stage in 1914, quickly achieved widespread fame, and now serves as both measuring rod<sup>228</sup> and adjective.<sup>229</sup>

On first blush, the idea of comparing Cardozo and Ruth appears ill-advised. A native New Yorker raised in relatively privileged circumstances, Cardozo was a highly-educated Jew with a close-knit family who performed much of his life's work out of direct public view.<sup>230</sup> A chaste and virtuous man often described as "saintly[.]"<sup>231</sup> Cardozo never married<sup>232</sup> and was uncomfortable around children.<sup>233</sup> Average in height (five feet, nine inches), with a slight build and a bit stooped,<sup>234</sup> Cardozo's most impressive attribute

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227. Like Cardozo, Ruth's life has inspired numerous books and articles, including: GEORGE BEIM & JULIA RUTH STEVENS, *BABE RUTH: A DAUGHTER'S PORTRAIT* (1998); ROBERT W. CREAMER, *BABE: THE LEGEND COMES TO LIFE* (1974); DAN DANIEL & H.G. SALSINGER, *THE REAL BABE RUTH* (1963); WILLIAM F. MCNEIL, *RUTH, MARIS, MCGWIRE AND SOSA: BASEBALL'S SINGLE SEASON HOME RUN CHAMPIONS* (1999); TOM MEANY, *BABE RUTH: THE BIG MOMENTS OF THE BIG FELLOW* (1947); ERNESTINE GICHNER MILLER, *THE BABE BOOK: BASEBALL'S GREATEST LEGEND REMEMBERED* (2000); DOROTHY RUTH PIRONE & CHRIS MARTENS, *MY DAD, THE BABE: GROWING UP WITH AN AMERICAN HERO* (1988); LAWRENCE S. RITTER & MARK RUCKER, *THE BABE: THE GAME THAT RUTH BUILT* (1997); BABE RUTH & BOB CONSIDINE, *THE BABE RUTH STORY* (1948); MRS. BABE RUTH & BILL SLOCUM, *THE BABE AND I* (1959); MARSHALL SMELSER, *THE LIFE THAT RUTH BUILT: A BIOGRAPHY* (1975); KEN SOBOL, *BABE RUTH & THE AMERICAN DREAM* (1974); KAL WAGENHEIM, *BABE RUTH: HIS LIFE AND LEGEND* (1974); MARTIN WELDON, *BABE RUTH* (1948); Warren Goldstein, *Babe Ruth*, in *THE READER'S COMPANION TO AMERICAN HISTORY* 960 (Eric Foner & John A. Garraty eds., 1991). See also Robert M. Jarvis, *Babe Ruth as Legal Hero*, 22 FLA. ST. U. L. REV. 885 (1995) (discussing Ruth's role as a litigant and subsequent embrace by judges and law professors).

228. Compare, e.g., KAUFMAN TEXT, *supra* note 1, at 569 ("Cardozo's record and reputation have made him a point of comparison for other judges, usually in terms of a judge or judicial nominee falling short of the mark, as being 'no Cardozo.'") with GENTILE, *supra* note 66, at 295 ("Seventy years after his retirement, 50 years after his death, it is difficult to assess the incredible impact Ruth had on baseball in particular and American sports in general, except in this way: He was, and remains, the yardstick by which all professional athletes must measure themselves.").

229. Compare, e.g., Christopher Hawthorne, Comment, "Deific Decree": *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1784 (2000) ("It is the traits that we may think of as quintessentially 'Cardozian'—the oracular style, the rhetorical flourishes, the seemingly preordained conclusions . . .") with Jeff Jacobs, *As Century Closes, Babe Still Having Big Impact*, HARTFORD COURANT, Oct. 23, 1999, at C1, available at 1999 WL 19955261 ("When something is bigger than big, it's huge. When it's huger than huge, it's Ruthian.").

230. KAUFMAN TEXT, *supra* note 1, at 3-5; POLENBERG, *supra* note 1, at 1-5, 133.

231. KAUFMAN TEXT, *supra* note 1, at 112, 183 (but see 483); POLENBERG, *supra* note 1, at 1, 240; POSNER, *supra* note 1, at 7-9; Weisberg, *supra* note 221, at 284-89.

232. See *supra* note 10.

233. KAUFMAN TEXT, *supra* note 1, at 149-50.

234. *Id.* at 182.



was his photographic memory, "which his friends remarked on all his life."<sup>235</sup> When it came time to relax, he read.<sup>236</sup>

Ruth, on the other hand, was a Roman Catholic who had been born in Baltimore's notorious waterfront district, received a rudimentary education at a school for incorrigible boys run by the Xaverian Brothers religious order, and began his big league career in Boston.<sup>237</sup> Rude and boorish,<sup>238</sup> Ruth traveled constantly, performed before enormous crowds, and, through repeated exposure in the press, became instantly recognizable to millions of people.<sup>239</sup> A man of enormous appetites, he went through food, alcohol, and women at a prodigious rate,<sup>240</sup> married twice,<sup>241</sup> and loved children dearly.<sup>242</sup> Physically, Ruth stood an imposing six feet, two inches, weighed 215 pounds (although this number fluctuated greatly), and possessed incredible eye-hand coordination, yet his memory was so poor he could not remember the names of even longtime teammates.<sup>243</sup> An avid sportsman, he loved to box, fish, golf, and hunt.<sup>244</sup> Except for his ghostwritten kids baseball book, Ruth had no use for reading.<sup>245</sup>

These outward differences are balanced, however, by an equally lengthy set of obvious similarities:

235. *Id.* at 30; *see also id.* at 144 (noting how Judge Kellogg once teased Cardozo when he recalled the volume, but not the page, of a particular case); POLENBERG, *supra* note 1, at 45.

236. KAUFMAN TEXT, *supra* note 1, at 157-58. As Kaufman points out, the quantity and range of books read by Cardozo was astounding, and the only real subject that appears not to have held his interest was modern fiction.

237. CREAMER, *supra* note 227, at 24-83; SMELSER, *supra* note 227, at 3-53; WAGENHEIM, *supra* note 227, at 11-26; *see also* BROTHER GILBERT, YOUNG BABE RUTH: HIS EARLY LIFE AND BASEBALL CAREER, FROM THE MEMOIRS OF A XAVERIAN BROTHER (Harry Rothgerber ed., 1999).

238. CREAMER, *supra* note 227, at 325-27; WAGENHEIM, *supra* note 227, at 84, 103-04.

239. CREAMER, *supra* note 227, at 21; SMELSER, *supra* note 227, at 166-70; WAGENHEIM, *supra* note 227, at 6-7, 62-67, 174.

240. CREAMER, *supra* note 227, at 21, 228-29, 302-03, 320-22; WAGENHEIM, *supra* note 227, at 83-84.

241. CREAMER, *supra* note 227, at 100, 343; SMELSER, *supra* note 227, at 56, 396; WAGENHEIM, *supra* note 227, at 30, 191-92.

242. CREAMER, *supra* note 227, at 332-34; SMELSER, *supra* note 227, at 149, 190-92.

243. CREAMER, *supra* note 227, at 320 ("when Waite Hoyt was leaving the Yankees in 1930 after eleven seasons as Babe's teammate in Boston and New York, Ruth shook hands and said solemnly, 'Goodbye, Walter'"); SMELSER, *supra* note 227, at 135-39, 326-27; WAGENHEIM, *supra* note 227, at 88, 92.

244. CREAMER, *supra* note 227, at 322-23, 354-55.

245. *Id.* at 316; WAGENHEIM, *supra* note 227, at 175.

YEAR	CARDOZO	RUTH
Birth	Born on May 24, 1870, one of eight children, although only he and his sister Ellen (nicknamed Nellie) will have a long life. <sup>246</sup>	Born on February 6, 1895, one of eight children, although only he and his sister Mary (nicknamed Mamie) will reach adulthood. <sup>247</sup>
1902	Moves from his parents' house to 16 West 75th Street, where he will spend nearly his entire adulthood. <sup>248</sup>	Moves from his parents' house to St. Mary's Industrial School for Boys, where he will spend nearly his entire youth. <sup>249</sup>
1913	Final year in practice. <sup>250</sup>	Final year in reformatory school. <sup>251</sup>
1914	Begins his judicial career with the trial level New York State Supreme Court but is quickly promoted to the top tier New York State Court of Appeals. <sup>252</sup>	Begins his baseball career with the minor league Baltimore Orioles but is quickly promoted to the major league Boston Red Sox. <sup>253</sup>

246. KAUFMAN TEXT, *supra* note 1, at 10-11, 15, 21; POSNER, *supra* note 1, at 4.

247. CREAMER, *supra* note 227, at 26-27; GENTILE, *supra* note 66, at 295; SMELSER, *supra* note 227, at 9; WAGENHEIM, *supra* note 227, at 11.

248. KAUFMAN TEXT, *supra* note 1, at 19, 84-85, 486 (explaining Cardozo held on to the house even after he moved to Washington and sold it only in 1937, just a short time before his death, for \$17,000).

249. CREAMER, *supra* note 227, at 29, 51-52; SMELSER, *supra* note 227, at 12; WAGENHEIM, *supra* note 227, at 14.

250. KAUFMAN TEXT, *supra* note 1, at 117-26.

251. CREAMER, *supra* note 227, at 45-52; SMELSER, *supra* note 227, at 30-36.

252. See *supra* notes 82-83 and accompanying text.

253. Ruth signed with the Orioles on February 14, was discharged from St. Mary's on February 27, joined the team on March 2, got into his first regular-season minor league game on April 22, was sold to the Red Sox on July 9, and made his major league debut on July 11. CREAMER, *supra* note 227, at 51-52, 56, 72, 80-81, 85-86; MCNEIL, *supra* note 227, at 19; SMELSER, *supra* note 227, at 36, 38, 45, 50, 52; WAGENHEIM, *supra* note 227, at 20, 24, 27.

1915	Receives the "first of his many honorary degrees" from Columbia University. <sup>254</sup>	Plays in the first of his many World Series, against the Philadelphia Phillies. <sup>255</sup>
1916	Establishes a national reputation with his opinion in <i>MacPherson v. Buick Motor Co.</i> , 111 N.E. 1050 (N.Y. 1916) (serves as the basis of modern products liability law). <sup>256</sup>	Establishes a national reputation by beating the Brooklyn Robins in Game 2 of the 1916 World Series (pitches a remarkable 13 consecutive scoreless innings, a number he boosts to a record-setting 29 2/3 in the 1918 World Series). <sup>257</sup>
1920-21	Redefines judging in his seminal work, <i>The Nature of the Judicial Process</i> , originally delivered as the Storrs Lectures at Yale Law School. <sup>258</sup>	Joins the New York Yankees and redefines baseball by hitting fifty-four home runs, then tops his own mark the next season with fifty-nine. <sup>259</sup>

254. KAUFMAN TEXT, *supra* note 1, at 162. Besides Columbia, Cardozo received honorary degrees from Brooklyn, Brown, Chicago, Harvard, Michigan, NYU, Pennsylvania, Princeton, St. Lawrence, Williams, Yale, Yeshiva, and the University of London. *Id.* at 473, 686 n.5.

255. CREAMER, *supra* note 227, at 115-17; SMELSER, *supra* note 227, at 75-76; WAGENHEIM, *supra* note 227, at 37. In all, Ruth played in ten World Series: 1915 (against the Phillies), 1916 (Brooklyn Robins), 1918 (Chicago Cubs), 1921-23 (New York Giants), 1926 (St. Louis Cardinals), 1927 (Pittsburgh Pirates), 1928 (Cardinals), 1932 (Cubs). TOTAL BASEBALL, *supra* note 24, at 291-92, 294, 297-99, 302-04, 308. As a batter in these contests, Ruth compiled a .325 batting average, hit 15 home runs, and drove in 32 runs; as a pitcher, he won 3 games and lost none, struck out 8, and posted an earned run average of 0.87. WAGENHEIM, *supra* note 227, at 273-74.

256. KAUFMAN TEXT, *supra* note 1, at 269-75; POLENBERG, *supra* note 1, at 2; POSNER, *supra* note 1, at 41-42, 107-09, 149-50.

257. CREAMER, *supra* note 227, at 127-30, 171-78; SMELSER, *supra* note 227, at 84-85, 101-05; TOTAL BASEBALL, *supra* note 24, at 292, 294; WAGENHEIM, *supra* note 227, at 38, 43-45.

258. KAUFMAN TEXT, *supra* note 1, at 203-19; POLENBERG, *supra* note 1, at 85-88; POSNER, *supra* note 1, at 12, 18-23.

259. CREAMER, *supra* note 227, at 228-39; WAGENHEIM, *supra* note 227, at 68-92.

1923	Helps inaugurate the American Law Institute, having played a leading role in its creation. <sup>260</sup>	Helps inaugurate Yankee Stadium, having played a leading role in its creation. <sup>261</sup>
1925-26	Suffers from an infection, collapses in a courtroom, and is rushed to a hospital. <sup>262</sup>	Suffers from an abscess, collapses in a train station, and is rushed to a hospital. <sup>263</sup>
1927	Reaches the pinnacle of his career in New York by becoming the Chief Judge of the court of appeals. <sup>264</sup>	Reaches the pinnacle of his career in New York by hitting sixty home runs, leading the Yankees to a record-setting number of wins, and helping them sweep the World Series from the Pittsburgh Pirates. <sup>265</sup>

260. KAUFMAN TEXT, *supra* note 1, at 173-75; POLENBERG, *supra* note 1, at 89-90; POSNER, *supra* note 1, at 3. For a further look at the founding of the American Law Institute and its subsequent work, see Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 36-38 (selective bibliography through 1994); Symposium, *The American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567 (1998); Symposium, "From the Trenches and Towers": *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 621 (1998).

261. CREAMER, *supra* note 227, at 276-78; GENTILE, *supra* note 66, at 36; SMELSER, *supra* note 227, at 270-75; WAGENHEIM, *supra* note 227, at 121-22. For a detailed look at Yankee Stadium's glorious past but uncertain future, see NEIL J. SULLIVAN, *THE DIAMOND IN THE BRONX: YANKEE STADIUM AND THE POLITICS OF NEW YORK* (2001).

262. KAUFMAN TEXT, *supra* note 1, at 160; POLENBERG, *supra* note 1, at 147-48.

263. CREAMER, *supra* note 227, at 286-90; SMELSER, *supra* note 227, at 304-13; WAGENHEIM, *supra* note 227, at 138-41.

264. KAUFMAN TEXT, *supra* note 1, at 178-82; POLENBERG, *supra* note 1, at 121-22; POSNER, *supra* note 1, at 3.

265. See *supra* notes 154-56 and accompanying text.

266. KAUFMAN TEXT, *supra* note 1, at 286-303 (describing, at 302, the opinion as a "major cause célèbre in American legal history"); POLENBERG, *supra* note 1, at 246-47 (saying, at 246, that it is "Cardozo's most famous torts opinion"); POSNER, *supra* note 1, at 16-17, 33-48 (calling it, at 16, "Cardozo's most famous opinion"). Posner believes *Palsgraf's* celebrity status is due to Cardozo's enormous reputation, the opinion's elliptical and often inaccurate statement of the facts, its eloquently pedagogic character, and Judge Andrews' rather inept dissent. POSNER, *supra* note 1, at 42-46. To this list Kaufman adds the opinion's adaptability for law school teaching, in recognition of the fact

1928	Writes his single most celebrated opinion, <i>Palsgraf v. Long Island R.R.Co.</i> , 162 N.E. 99 (N.Y. 1928); <sup>266</sup> publishes <i>The Paradoxes of Legal Science</i> , in which he discusses the difficulties of judging; <sup>267</sup> although normally apolitical, vigorously supports Governor Alfred E. Smith for president because he believes the election of a Catholic will be good for the Jews. <sup>268</sup>	In Game 4 of the World Series against the St. Louis Cardinals, has the single greatest day of his career (hits three home runs and makes a spectacular catch that clinches the Series); <sup>269</sup> publishes <i>Babe Ruth's Own Book of Baseball</i> , in which he discusses the difficulties of hitting; <sup>270</sup> although normally apolitical, vigorously supports Governor Alfred E. Smith for president because they are both Catholic and share the same humble roots. <sup>271</sup>
1929	Beloved sister Nellie dies, leaving him despondent; <sup>272</sup> financially, is unaffected by "Black Tuesday" because his portfolio contains no stocks. <sup>273</sup>	Estranged wife Helen dies, leaving him free to marry Claire Hodgson; <sup>274</sup> financially, is unaffected by "Black Tuesday" because his

that nearly every American law student now reads *Palsgraf* during his or her first year of law school. KAUFMAN TEXT, *supra* note 1, at 303.

267. KAUFMAN TEXT, *supra* note 1, at 219-22, 253-54; POLENBERG, *supra* note 1, at 2; POSNER, *supra* note 1, at 27-28, 30.

268. KAUFMAN TEXT, *supra* note 1, at 188; POLENBERG, *supra* note 1, at 182-83.

269. CREAMER, *supra* note 227, at 311-14; SMELSER, *supra* note 227, at 383-84; WAGENHEIM, *supra* note 227, at 178-80. Even Ruth himself considered this game to be his finest performance:

When he finished he ducked under the stands for a few minutes and came back with a hot dog. He sat on the Browns' bench next to Killefer and the reporter. "What was the biggest thrill you ever got out of a ballgame?" the reporter asked. "Biggest thrill?" Ruth said. He bit off half the hot dog and gulped it down. "That's easy. It happened here in St. Louis when I got three home runs in one World Series game and made that running catch off Frankie Frisch. Picked the ball right out of the stands. And I got a thrill out of little Sherdel trying to sneak that strike over on me when I wasn't looking and then hitting one out."

CREAMER, *supra* note 227, at 316-17.

270. WAGENHEIM, *supra* note 227, at 175.

271. CREAMER, *supra* note 227, at 316, 318-19; SMELSER, *supra* note 227, at 386-87; WAGENHEIM, *supra* note 227, at 176, 181-82.

272. KAUFMAN TEXT, *supra* note 1, at 192-96; POLENBERG, *supra* note 1, at 9-11.

273. See KAUFMAN TEXT, *supra* note 1, at 150.

		portfolio contains no stocks. <sup>275</sup>
1932	Becomes a member of the United States Supreme Court, the crowning achievement of his stellar career; <sup>276</sup> has his salary cut from \$22,500 to \$20,000. <sup>277</sup>	In Game 3 of the World Series against the Chicago Cubs, hits "The Called Shot," the crowning achievement of his stellar career; <sup>278</sup> has his salary cut from \$80,000 to \$75,000. <sup>279</sup>
1936-37	Cements his place at the United States Supreme Court with his opinion in <i>Palko v. Connecticut</i> , 302 U.S. 319 (1937) (selective	Cements his place in baseball by being named a charter inductee of the Baseball Hall of Fame in Cooperstown, New York (receives 215 of

274. CREAMER, *supra* note 227, at 335-45; GENTILE, *supra* note 66, at 297; SMELSER, *supra* note 227, at 391-99, 405; WAGENHEIM, *supra* note 227, at 185-94.

275. CREAMER, *supra* note 227, at 345; SMELSER, *supra* note 227, at 405; WAGENHEIM, *supra* note 227, at 197-98.

276. See *supra* notes 189-90 and accompanying text.

277. Despite moving from a lower court to a higher court, Cardozo's pay fell due to the federal government's less generous wage scale. Compare Act of Dec. 13, 1926, ch. 6, 44 Stat. 919 (Associate Justices of the United States Supreme Court to be paid \$20,000) with 1926 N.Y. Laws ch. 94, § 1 (setting the salary of the Chief Judge of the New York State Court of Appeals at \$22,500).

278. CREAMER, *supra* note 227, at 358-68; SMELSER, *supra* note 227, at 445-50; WAGENHEIM, *supra* note 227, at 210-13. Of all the stories about Babe Ruth, none has been more hotly contested over the years than whether he actually signaled where he planned to hit Charlie Root's next pitch. While Ruth claimed he had pointed to center field, Root insisted Ruth had merely gestured to the Cubs' dugout, which had been needling him throughout the Series. In 1999, a long-lost film taken by Harold Warp, an amateur photographer attending the only baseball game of his life, was discovered and aired nationally by ESPN. Although it suggests Ruth did not call his shot, the grainy footage has not put an end to the controversy. See Richard Sandomir, *Old Home Movie Captures the Shot The Babe 'Called'*, N.Y. TIMES, Dec. 24, 1999, at D1; Richard Marazzi, *Babe Ruth: Did the Babe Call the Shot?*, at <http://www.connecticutsbest.com/userpages/Babe.html> (last visited July 17, 2001).

279. CREAMER, *supra* note 227, at 355-56; SMELSER, *supra* note 227, at 440-41; WAGENHEIM, *supra* note 227, at 207-08. As these sources explain, this was the first of what became a series of annual reductions due to Ruth's diminishing baseball skills. See CREAMER, *supra* note 227, at 355-56, 369-71, 374-75, 385-86 (charting Ruth's pay as it falls from a career-high \$80,000 in 1931 to \$75,000 in 1932 to \$52,000 in 1933 to \$35,000 in 1934 to \$25,000 plus profit-sharing in 1935, his last year as an active player).

280. KAUFMAN TEXT, *supra* note 1, at 552-54; POLENBERG, *supra* note 1, at 217-33. Although *Palko*'s holding (that the federal constitution's prohibition against double jeopardy does not apply to the states) was overruled in *Benton v. Maryland*, 395 U.S. 784 (1969), Cardozo's view that the

	incorporation of the Bill of Rights). <sup>280</sup>	226 votes). <sup>281</sup>
1938	Final months on the bench, although his role is reduced to that of a spectator due to illness (writes no opinions). <sup>282</sup>	Final season in baseball, although his role is reduced to that of a spectator due to advancing age (part-time coach of the Brooklyn Dodgers). <sup>283</sup>
Death	Dies on July 9, 1938 in Westchester County and is buried in a New York City cemetery next to his beloved sister Nellie. <sup>284</sup> Pursuant to his will, a part of his \$350,000 estate is given to Columbia University with instructions to name a chair in	Dies on August 16, 1948 in New York City and is buried in a cemetery in Westchester County next to a plot reserved for his beloved wife Claire. <sup>286</sup> Pursuant to his will, a part of his \$350,000 estate is used to support the youth foundation he has named after himself. <sup>287</sup>

protections of the Bill of Rights should be made applicable to the states only when "ordered liberty" requires "is still accepted by a majority of the Court today." KAUFMAN TEXT, *supra* note 1, at 554. See also POSNER, *supra* note 1, at 122 (describing the opinion as "of enduring interest").

281. CREAMER, *supra* note 227, at 410-11; SMELSER, *supra* note 227, at 513-14; TOTAL BASEBALL, *supra* note 24, at 235; WAGENHEIM, *supra* note 227, at 249.

282. KAUFMAN TEXT, *supra* note 1, at 566-67; POLENBERG, *supra* note 1, at 236-37; POSNER, *supra* note 1, at 5.

283. CREAMER, *supra* note 227, at 410-14; SMELSER, *supra* note 227, at 518-21; WAGENHEIM, *supra* note 227, at 240-43.

284. KAUFMAN TEXT, *supra* note 1, at 567, 578; POLENBERG, *supra* note 1, at 237-38. As these works explain, Cardozo died at the home of his close friend Irving Lehman in Port Chester, a small hamlet in Westchester County. See *Village of Port Chester*, at [http://www.townlink.com/community\\_web/portchester.htm](http://www.townlink.com/community_web/portchester.htm) (last visited July 8, 2001). For a picture of Cardozo's grave and Nellie's adjoining headstone, see *Benjamin Nathan Cardozo*, at <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&Grid=172> (last visited July 8, 2001).

285. HELLMAN, *supra* note 1, at 305-08 (estimating, at 307, that Cardozo's estate was worth "between three and four hundred thousand dollars"); KAUFMAN TEXT, *supra* note 1, at 577-78 (setting the figure at \$325,000, exclusive of books, china, jewelry, and silverware). As these sources indicate, roughly \$190,000 went to Columbia to establish the Cardozo Professor of Jurisprudence. At present, the chair is held by George P. Fletcher, a distinguished criminal law expert. See *George P. Fletcher*, at <http://www.law.columbia.edu/faculty/gfletcher.html> (last visited July 8, 2001).

286. SMELSER, *supra* note 227, at 539-45; WAGENHEIM, *supra* note 227, at 270-71; Arthur Hirsch, *Like the Man Himself, Gravesite a Draw to Fans*, BALTIMORE SUN, Feb. 3, 1995, at 13E, available

	jurisprudence in his honor. <sup>285</sup>	
Career Numbers	Serves 25 years on 3 different courts, writing 693 majority opinions, an average of 28 per year. <sup>288</sup>	Plays 22 years on 3 different major league teams, hitting 714 regular-season home runs, an average of 32 per year. <sup>289</sup>

Eventually, of course, one moves past first impressions and tries to look deeper. Doing so reveals that both Cardozo and Ruth experienced abbreviated relationships with their parents;<sup>290</sup> had their lives shaped by one special teacher;<sup>291</sup> spent their careers surrounded by capable men who made it

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at 1995 WL 2415217; *Biography*, at <http://www.baberruth.com/biograph.html> (last visited July 8, 2001). For pictures of the Ruths' joint headstone, see *Babe Ruth (George Herman)*, at <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&Grid=919> (last visited July 8, 2001).

287. SMELSER, *supra* note 227, at 546. According to Smelser, the net value of Ruth's estate when it finally closed in 1951 was \$360,811, of which 90% went to his wife and daughters and 10% was designated for the Babe Ruth Foundation.

288. As previously mentioned, *see supra* notes 82-85, 282 and accompanying text, Cardozo went on the New York State Supreme Court in 1914, was elevated five weeks later to the New York State Court of Appeals, and finished his judicial career in 1938 as a member of the United States Supreme Court. While on the court of appeals, Cardozo penned 566 majority opinions, KAUFMAN TEXT, *supra* note 1, at 166, and produced another 127 following his appointment to the Supreme Court. POSNER, *supra* note 1, at 87.

289. Ruth's career lasted from 1914 to 1935, during which time he played first with the Boston Red Sox, then with the New York Yankees, and finally with the Boston Braves. TOTAL BASEBALL, *supra* note 24, at 106-07, 1143. His record of 714 regular-season home runs "was not bested until 1974, when Henry Aaron hit No. 715 after nearly 3,000 more at bats . . ." *Id.* at 106.

290. As will be recalled, Cardozo's mother passed away when he was nine and his father died when he was fifteen. *See supra* text accompanying notes 10 and 39. Ruth was sent away to reform school by his parents when he was seven, *see supra* text accompanying note 249, and lost his mother when he was fifteen. *See* WAGENHEIM, *supra* note 227, at 14.

291. For Cardozo, the special teacher was Horatio Alger, Jr., *see supra* note 37 and accompanying text, while for Ruth it was Brother Matthias Boutier, with whom he formed a lifelong bond. SMELSER, *supra* note 227, at 14, 21. Smelser has written:

This was the man who first took charge of the "baffled little bum of seven" when he came to St. Mary's. He attended to George simply because George needed attention. He measured young Ruth's talents and set about to develop them. For twelve years he was patient to perfection. He saw Ruth off into the world each time he left, and welcomed him back each time he was returned because of truancy from the Maryland school system. He tutored George in reading and writing (teaching the Xaverian style of handwriting, well shown in Ruth's handsome autograph), put him on the baseball teams that suited his successive stages of growth, got him started at learning the needle trades [so as to become a tailor], and tried to explain the difference between right and wrong. Ruth believed Brother Matthias preserved him from the penitentiary, and later said flatly, "Brother Matthias was the greatest man I ever knew." Young Ruth very early showed a startling natural talent with a baseball bat, so Brother Matthias began to round



possible for them to achieve their full potential;<sup>292</sup> formed unusually close relationships with their eventual successors, Irving Lehman and Lou Gehrig;<sup>293</sup>

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him out by teaching him pitching and fielding.

*Id.* at 14. For further descriptions of Ruth's relationship with Brother Matthias, see CREAMER, *supra* note 227, at 34-38; GENTILE, *supra* note 66, at 295; WAGENHEIM, *supra* note 227, at 16.

292. Cardozo, of course, spent the bulk of his judicial career (1914-32) with the New York State Court of Appeals. See *supra* notes 82-85 and accompanying text. These were years in which the court's reputation grew steadily, helped by the addition of such men as Cuthbert Pound (1915-34), William Andrews (1917-28), and Irving Lehman (1924-45). KAUFMAN TEXT, *supra* note 1, at 130 ("The state's large population and economic power gave the court of appeals a head start in prominence. But the caliber of the personnel was the principal reason for the court's new fame."); COURT HISTORY, *supra* note 83. Thus, while "Cardozo stood out among his peers, [he did] not [stand] over them. It was not a one-man court, nor a group of disciples under a master. The court as a whole was a strong one, with strong personalities." KAUFMAN TEXT, *supra* note 1, at 167; see also POSNER, *supra* note 1, at 13 (noting, somewhat harshly, that "Cardozo's colleagues . . . were competent professionals although not sparklers."). Similarly, Ruth was a member of the New York Yankees from 1920 to 1934. GENTILE, *supra* note 66, at 294-97. While he was clearly the team's biggest star, the Yankees during these years also employed twelve other future Hall of Famers: general manager Ed Barrow (whose tenure with the Yankees overlapped Ruth's from 1920 to 1934), managers Miller Huggins (1920-29) and Joe McCarthy (1931-34), catcher Bill Dickey (1928-1934), first baseman Lou Gehrig (1923-34), second baseman Tony Lazzeri (1926-34), center fielder Earle Combs (1924-34), and pitchers Burleigh Grimes (1934), Lefty Gomez (1930-34), Waite Hoyt (1921-30), Herb Pennock (1923-33), and Red Ruffing (1930-34). *Id.* at 76-77, 131-32, 147-48, 168-69, 219-20, 409-10, 415-16, 432-33, 488-89, 509-10; TOTAL BASEBALL, *supra* note 24, at 223-25; *Hall of Famer Biographies*, at [http://baseballhalloffame.org/hofers\\_and\\_honorees/hofer\\_bios/index.htm](http://baseballhalloffame.org/hofers_and_honorees/hofer_bios/index.htm) (last visited July 8, 2001). As such, part of the credit for Ruth's triumphs is due to his teammates' abilities: "The superiority of the Yankees was a team superiority. They gave up the fewest runs, their pitchers led the league in complete games, in strikeouts, and in earned-run average. Their fielders made the fewest errors by far and had much the best fielding average." SMELSER, *supra* note 227, at 282; see also *id.* at 364 ("Ruth was helped by the superior hitting of the Yankees because it gave him more times at bat. At his home-run rate we may figure by arithmetic that he might have hit fifty-eight with the 1927 Browns.") and 549 ("Babe Ruth's success depended on his constitution and his temperament, but it also owed much to the accident of timing. If he had come to New York before the First World War he would have played with a weakly financed team much less able and popular than the Giants.").

293. Lehman and Cardozo served together on the New York State Court of Appeals from 1924 to 1932, it was in Lehman's house that Cardozo died, and it was Lehman who inherited (and disposed of) Cardozo's personal papers. See *supra* notes 1, 284, and 292; see also KAUFMAN TEXT, *supra* note 1, at 131 ("He was Cardozo's closest friend on the court, and the friendship expanded to include Irving Lehman's wife Sissie . . .") and *infra* note 321. Following in Cardozo's footsteps, Lehman was elected Chief Judge in 1939 and remained such until his death in 1945. See COURT HISTORY, *supra* note 83. Gehrig joined the Yankees in 1923 and was with the team until illness forced him to retire in 1939. GENTILE, *supra* note 66, 168-70. In the early 1930s, Gehrig began to supplant Ruth as the team's best player, finally doing so in 1934 when he won the Triple Crown with a .363 batting average, 49 home runs, and 165 runs batted in. *Id.* at 170. Just like Ruth in 1922, Gehrig served as the Yankees' captain from 1935 to 1941. See *Yankee Captains*, at <http://www.ultimateyankees.com/YankeeHistory.html> (last visited July 9, 2001). Gehrig was Ruth's closest friend on the Yankees, and the two shared their off-seasons barnstorming, hunting, playing bridge, and going to football games. CREAMER, *supra* note 227, at 379-80. Although they had a falling out in 1933 over Ruth's daughter Dorothy, they repaired the rift in 1939 during Lou Gehrig

stepped away from their religions as adults, despite having been raised in devout environments;<sup>294</sup> were widely admired by their peers, except for one who unleashed a torrent of shocking invective;<sup>295</sup> felt most at home on Manhattan's Upper West Side;<sup>296</sup> enjoyed their greatest fame in New York but finished their careers lonely and in relative obscurity elsewhere;<sup>297</sup> and

Day at Yankee Stadium. SMELSER, *supra* note 227, at 478-80, 524.

294. Cardozo was a lapsed Jew, *see supra* note 36 and accompanying text, while Ruth was a lapsed Catholic. CREAMER, *supra* note 227, at 283-84, 330; WAGENHEIM, *supra* note 227, at 15. Nevertheless, both had religious funerals. Compare POLENBERG, *supra* note 1, at 238 (traditional service conducted in Hebrew by a rabbi) with SMELSER, *supra* note 227, at 543-45 (traditional service conducted in Latin by Cardinal Spellman).

295. Shortly after his death, Cardozo was ridiculed in a sarcastic and condescending article written by Judge Jerome Frank of the Second Circuit. *See* Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943). Their dispute had begun years earlier, following a speech Cardozo delivered to the New York State Bar Association just before his appointment to the United States Supreme Court. So vicious was Frank's attack that it has been suggested it "might invite an accusation of anti-Semitism" if "Frank hadn't himself been Jewish." POSNER, *supra* note 1, at 11. For further descriptions of Frank's obsessive hatred of Cardozo, which was born out of deep-seated jealousy, *see* KAUFMAN TEXT, *supra* note 1, at 456-61; POLENBERG, *supra* note 1, at 160-67. In much the same way, the great Detroit Tigers outfielder Ty Cobb tried to run Ruth down. Not only would Cobb yell "cruel and humorless" obscenities at Ruth from the dugout, he picked up and regularly repeated an untrue story that Ruth failed to practice proper personal hygiene. AL STUMP, COBB: A BIOGRAPHY 329 (1994). Cobb also delighted in calling Ruth a "nigger" because of Ruth's round face, broad nose, and dark complexion. *Id.*; *Babe Ruth Black?*, at <http://www.eteamz.com/sportsrap/> (last visited July 19, 2001). (Although there is no evidence that Ruth was African-American, *see* the sources cited *supra* note 227, the question of his heritage recently has resurfaced due to the publication in May 2001 of a provocative article by film director Spike Lee. *See* Clarence Page, *Could It Be True the Babe was Black?*; *Moviemaker's Column Revives Rumors About Ruth*, CHI. TRIB., May 13, 2001, at 19C). Like Frank with Cardozo, Cobb's hatred of Ruth was the result of professional jealousy. As explained more fully *infra* note 303 and accompanying text, before Ruth baseball was a slow, tedious affair that put a premium on bunting and base stealing. After Ruth's emergence as a star, however, baseball became a slugger's fest:

[T]he earlier game was the Cobb Game, the later was the Ruth Game . . . Cobb did his work coldly and craftily while Ruth played loosely and joyously, and the happy big bang sold a lot more tickets than Cobb's foxiness sold. Ruth was the first man who seemed always capable of breaking up the ball game every day he played. It became a national household question—Did he hit one today?

SMELSER, *supra* note 227, at 554.

296. Cardozo lived at 16 West 75th Street from 1902 to 1932. *See supra* note 248 and accompanying text. Upon being sold to the Yankees in 1920, Ruth took a suite at the elegant Ansonia Hotel at 73rd Street and Broadway. CREAMER, *supra* note 227, at 228. Although he later moved frequently to escape his fans, Ruth always stayed between 70th and 90th Streets near Riverside Drive. *See* Ray Robinson, *Me and the Babe*, at <http://tsn.sportingnews.com/archives/baseball/92300.html> (last visited July 9, 2001); *see also* JIM REISLER, *BABE RUTH SLEPT HERE: THE BASEBALL LANDMARKS OF NEW YORK CITY* (1999). Despite their physical proximity, there is no evidence Cardozo and Ruth ever met.

297. Cardozo spent his final years in Washington on the United States Supreme Court, *see supra* notes 189-91 and accompanying text, while Ruth ended his playing days in Boston with the Braves. *See supra* note 289. These experiences were painful for both men, as what had previously been their greatest joys—respectively, judging cases and playing baseball—became unbearable drudgery. As to

patterned their professional selves after men who now are viewed as having been deeply flawed.<sup>298</sup> At the end of the day, however, the most remarkable tie between Cardozo and Ruth is how their extraordinary feats wiped away the sins of others.

As will be recalled, Cardozo took up law as penance for his father Albert's disgrace on the bench.<sup>299</sup> He became so successful at this task that by the time he died in 1938, the name Cardozo had gone from being a symbol of judicial

Cardozo, *see* KAUFMAN TEXT, *supra* note 1, at 472-90; POLENBERG, *supra* note 1, at 170-74; POSNER, *supra* note 1, at 121-24. As to Ruth, *see* CREAMER, *supra* note 227, at 392-402; SMELSER, *supra* note 227, at 489-508; WAGENHEIM, *supra* note 227, at 230-37. These sources make it clear Cardozo and Ruth's troubles were caused by the same three factors: 1) declining health (Cardozo was sixty-one and suffering from heart disease, while Ruth was forty and paying the price for his long years of carousing, drinking, and overeating); 2) diminished responsibility (Cardozo went from Chief Judge to junior Associate Justice, while Ruth went from starting right fielder to role player); and, 3) unfamiliar work (Cardozo, a lifelong state court judge, began being confronted by federal issues, while Ruth, a lifelong American Leaguer, began facing National League pitching).

298. Cardozo, of course, tried to follow in the footsteps of Oliver Wendell Holmes. *See supra* note 218 and accompanying text. Although many regard Holmes as one of America's greatest judges, *see, e.g.,* James E. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462 (1983) (noting lists of outstanding judges routinely include Holmes), others view him quite differently:

When one considers that the only "progressive" reform for which Holmes exhibited any enthusiasm was compulsory sterilization, that he repeatedly professed his skepticism toward the worth of wages and hours legislation or other efforts to redress inequalities in the marketplace, that he adopted an ultrapositivist view of governmental power to limit the rights of aliens, that he showed little solicitude for the civil rights of racial minorities, and that he ridiculed the positions of dissident speakers whose constitutional rights he supported, his image as a liberal appears to be a considerable distortion of his stance as a Supreme Court justice. The "discovery" of Holmes in the last two decades of his tenure on the Court testifies to the fortuitous process by which judicial reputations are created.

G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 408-09 (1993). Another recent commentator is even more blunt in her assessment:

Holmes was a failure. He failed to participate in the larger intellectual history of law in our century; failed, for the most part, to set his mark not upon constitutional history but even upon the common law; and failed to come to grips with the big issues of his and our time.

Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 692 (1997). A third critic has gone so far as to put Holmes "on trial" for what he allowed to happen to Carrie Buck (forced sterilization) and Eugene V. Debs (incarceration for being a Socialist). *See* Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173 (1994); *see also supra* note 217 and accompanying text (noting criticism of Holmes' *Federal Baseball* decision). Ruth, on the other hand, tried to emulate Shoeless Joe Jackson, who he considered the game's best hitter. SMELSER, *supra* note 227, at 64, 84, 176; WAGENHEIM, *supra* note 227, at 77. Jackson later was permanently banned from baseball for throwing the 1919 World Series. *See infra* notes 301-03 and accompanying text; *see also* DAVID L. FLEITZ, *SHOELESS: THE LIFE AND TIMES OF JOE JACKSON* (2001); DONALD GROPMAN, *SAY IT AIN'T SO, JOE!: THE TRUE STORY OF SHOELESS JOE JACKSON* (2d rev. ed. 1999); Donald Arthur Winslow & Seth C. Anderson, *From "Shoeless" Joe Jackson to Ivan Boesky: A Sporting Response to Law and Economics Criticism of the Regulation of Insider Trading*, 81 KY. L.J. 295 (1992-93).

299. *See supra* note 51 and accompanying text.

corruption to the embodiment of judicial honor.<sup>300</sup>

With respect to Ruth, the sin was more remote but no less profound. In the fall of 1919, 8 members of the Chicago White Sox threw the World Series to the Cincinnati Reds in exchange for a promised bribe of \$100,000.<sup>301</sup> When their actions came to light the following year, the public was enraged.<sup>302</sup> In this dark and desperate hour, Babe Ruth emerged and singlehandedly saved baseball by reinventing it. Overnight, the tedious pitchers' duels of the past, in which teams painstakingly scratched out each run, were replaced by high scoring affairs featuring sudden outbursts of power. Captivated by the prospect of seeing a home run, fans quickly forgot the Black Sox scandal and came streaming back to baseball in numbers unimaginable only a few years earlier.<sup>303</sup>

300. KAUFMAN TEXT, *supra* note 1, at 470-71, 569.

301. BASEBALL ROOTS, *supra* note 21, at 65-66; BURK, *supra* note 21, at 232; RADER, *supra* note 21, at 103-05; RIESS, *supra* note 18, at 92-94. For more complete descriptions of the scandal, see ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963); James R. Devine, *Baseball's Labor Wars in Historical Context: The 1919 Chicago White Sox as a Case-Study in Owner-Player Relations*, 5 MARQ. SPORTS L.J. 1 (1994); James Kirby, *The Year They Fixed the World Series*, A.B.A. J., Feb. 1, 1988, at 65.

302. As has been written elsewhere:

In September of 1920 a shocking revelation rocked the nation: the 1919 World Series had been fixed. The worst team ignominy in the history of American sport, soon labeled the "Black Sox Scandal" or "The Big Fix," crowded the "Red Scare," the presidential election race pitting James M. Cox against Warren Gamaliel Harding, and every other major story off the front pages of the nation's newspapers. Americans were incredulous. According to baseball legend, a small boy approached "Shoeless Joe" Jackson, one of the conspirators and a star outfielder with the Chicago White Sox. "Say it ain't so, Joe," begged the lad, as tears welled from his eyes. "I am afraid it is, son," Jackson responded. The wound was a deep one. . . . The scandal punctured the illusions of Nelson Algren, then a boy on Chicago's South Side. "Everybody's out for The Buck," he concluded. F. Scott Fitzgerald voiced a similar disillusionment: "It never occurred to me that one man could start to play with the faith of fifty million people—with the singlemindedness of a burglar blowing a safe," reflects a character in *The Great Gatsby*.

RADER, *supra* note 21, at 99; see also RIESS, *supra* note 18, at 96 ("If baseball was no good, what hope was there for the rest of our culture and society?").

303. See RADER, *supra* note 21, at 112-23. According to Rader:

Ruth's exploits, far more than [Commissioner] Landis's stern edicts against fixes and fixers, triggered a renewed interest in major league baseball. Attendance in the 1920s reached all-time highs. . . . Ruth was also the catalyst for a great revolution in hitting. During his career, the pendulum swung away from the pitchers to the hitters. Beginning with the AL's 1920 season, the hitters went on a rampage that continued through the 1941 season before it finally cooled down during the World War II era. . . . Everywhere in the league, the fans poured out to the ballparks to see the Yankees play, apparently caring little whether the home team won or lost but hoping to see the Babe hammer a pitch out of the park. . . . Each day, millions turned to the sports pages of their newspaper to see whether Ruth had hit another home run.

*Id.* at 112, 120; see also BASEBALL ROOTS, *supra* note 21, at 239 ("The 'Bambino' single-handedly changed baseball forever, by bringing on the era of the slugger, and is still considered to be the greatest player of all time."); NEFT, *supra* note 155, at 124 ("The disgrace of the Black Sox scandal

## V. CONCLUSION

From all that has been written about him, it seems safe to say that Cardozo never saw, much less played in, a baseball game. Regardless, one cannot help but wonder what team he would have rooted for had he become a fan and what position he would have favored.

From the available evidence, it seems clear Cardozo would have been a New York Giants fan.<sup>304</sup> Because he was only six when the New York Mutuels folded,<sup>305</sup> Cardozo would have chosen between the Metropolitans and the Giants, who both began playing in nearby Central Park when he was thirteen.<sup>306</sup> Although the Metropolitans were better than the Giants in the teams' early years,<sup>307</sup> Cardozo probably would have gravitated to the more upscale Giants,<sup>308</sup> especially after the Metropolitans changed owners and moved to Staten Island in 1886.<sup>309</sup>

Given the availability of the Giants, Cardozo would not have become a fan of any of the clubs in Brooklyn.<sup>310</sup> Not only was Brooklyn still a separate

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was softened by the unprecedented power of Babe Ruth's bat, aided by a much livelier ball."); SMELSER, *supra* note 227, at 554 ("His twenty-nine home runs of 1919 and his fifty-four of 1920 eclipsed the scandal, blocked it out of the minds of people, so that the miscreants got about a tenth of the attention they would have had in, say, 1910."); TOTAL BASEBALL, *supra* note 24, at 106 ("Ruth revolutionized the game with his unprecedented slugging, and in the wake of the 'Black Sox Scandal' of 1919 he singlehandedly restored America's love of baseball."); WAGENHEIM, *supra* note 227, at 78 ("Landis's appointment helped to restore faith in baseball, but even more important was Ruth's fantastic batting that fall, which day after day exhilarated fans all over the country.").

304. If he were alive today, however, Cardozo's favorite team undoubtedly would be the Benjamin N. Cardozo High School Judges. A perennial power in New York City baseball, in 1999 Judges alumnus Peter Munro made it to the major leagues as a pitcher for the Toronto Blue Jays, *see* Anthony McCarron, *Cardozo Grad Finds Home in Jays' Pen*, N.Y. DAILY NEWS, Apr. 27, 1999, at 72, available at 1999 WL 17230991, while in 2000 the Judges capped a decade of Queens Division A-III titles. *See* Evan Grossman, *Cardozo Again King of Queens*, N.Y. POST, May 16, 2000, at 76, available at 2000 WL 19654531. For a further look at the school (which opened in 1967) and its flourishing athletic program, *see Benjamin N. Cardozo High School*, at <http://www.cardozohigh.com> (last visited July 5, 2001); *Benjamin N. Cardozo High School*, at <http://www.newsday.com/liname/nynam55.pdf> (last visited July 6, 2001); *Benjamin Cardozo School Profile*, at [http://www.psal.org/psal\\_schoolprofile.asp?cschool=26505](http://www.psal.org/psal_schoolprofile.asp?cschool=26505) (last visited July 6, 2001).

305. *See supra* notes 23-26 and accompanying text.

306. *See supra* notes 27-31 and accompanying text. Cardozo would have found it easy to get to games—either by walking or taking a “carriage via Central Park.” RIESS, *supra* note 18, at 104.

307. *See supra* notes 32-35 and accompanying text.

308. *Compare* notes 15 (discussing Cardozo's elite background) and 30 (explaining Giants games were geared to the upper classes).

309. *See supra* note 30. Even if Cardozo had become a fan of the Metropolitans, the team's demise in 1887 would have forced him to find a new club for the 1888 season. BASEBALL ROOTS, *supra* note 21, at 354.

310. Brooklyn was home to four major league teams during Cardozo's childhood. From 1871-75, the Eckfords (later the Atlantics) competed in the National Association. FILICHIA, *supra* note 73, at

city—the merger between it and Manhattan would not occur until 1898—it would have been difficult and time-consuming for Cardozo to get to games because the only physical link between the two municipalities was the Brooklyn Bridge.<sup>311</sup> Moreover, Cardozo had been born, raised, and educated in Manhattan, and felt a strong attachment to his hometown.<sup>312</sup>

As a Giants fan, Cardozo would have faced a tough choice during the 1890 season, when the National League and the Players League each fielded New York teams called the Giants, the former billed as “the real Giants” and the latter as “the big Giants.”<sup>313</sup> Considering his pragmatic nature,<sup>314</sup> perhaps Cardozo would have hedged his bets and supported both. Of course, the quick demise of the Players League<sup>315</sup> meant the problem did not resurface in 1891.

In 1903, the New York Highlanders arrived from Baltimore and began playing just a few blocks to the north of the Polo Grounds.<sup>316</sup> It seems highly unlikely, however, that Cardozo would have forsaken the powerhouse Giants and begun following the Highlanders, who were not only carpetbaggers but also quickly became the doormats of the American League while playing in one of the worst facilities in the majors.<sup>317</sup> By the time the Yankees won their first pennant in 1921,<sup>318</sup> Cardozo would have been a Giants fan for nearly forty years. That fall, he probably would have taken great delight in watching the

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29-30. In 1884, the Trolley-Dodgers (renamed the Bridegrooms in 1889) began playing in the American Association. *Id.* When they transferred to the National League in 1890, a new team known as the Gladiators replaced them. *Id.* That same year, the Players League (in its only season) fielded the Wonders. *Id.* at 30. When the Gladiators and the Wonders both folded in the fall, *id.* at 29-30, Brooklyn again belonged solely to the Bridegrooms, who in 1899 became the Superbas, in 1911 took the name Dodgers, in 1914 switched to the Robins, and in 1932 reverted to the Dodgers. *Id.*

311. RIESS, *supra* note 18, at 77-78, 105-08 (describing the isolation of Brooklyn and the problems its geography posed for baseball fans).

312. See HELLMAN, *supra* note 1, at 19 (noting Cardozo had a “perennial interest in the life of New York, the city of his ancestors, the city with which he ever found his own life so intimately and affectionately interwoven.”); see also KAUFMAN TEXT, *supra* note 1, at 473, 567 (describing Cardozo as having “an emotional tie to New York” and reporting that upon his final trip to New York City, Cardozo remarked, “This is the place I love.”); POLENBERG, *supra* note 1, at 171 (“On visits to New York City [during his years on the Supreme Court], he would say, ‘I am back amid my native skyscrapers, rejoicing in the dust and din.’”).

313. SCHOTT & PETERS, *supra* note 29, at 6. These monikers were themselves misleading due to the fact that “nearly the whole roster of the National League New York Giants club followed the lead of team captain Buck Ewing and defected to the Players League version of the Giants.” BASEBALL ROOTS, *supra* note 21, at 358.

314. See *supra* note 145 and accompanying text.

315. See *supra* note 57 and accompanying text.

316. See *supra* note 66 and accompanying text.

317. BASEBALL ROOTS, *supra* note 21, at 359; GENTILE, *supra* note 66, at 12-15; RIESS, *supra* note 18, at 109; TOTAL BASEBALL, *supra* note 24, at 43.

318. TOTAL BASEBALL, *supra* note 24, at 43.

Giants rout the Yankees in the first of their three straight meetings in the World Series.<sup>319</sup>

Perhaps Cardozo would have reviewed his allegiances when he moved from New York to Washington in 1932 to take his seat on the United States Supreme Court. Because the local team (the Senators) was in the American League,<sup>320</sup> it would have been all but impossible for Cardozo to follow the Giants.<sup>321</sup> Therefore he may have bowed to the realities of his situation and begun rooting for the Senators. Doing so undoubtedly would have been painful for Cardozo—they had defeated the Giants in the 1924 World Series, just one year after the Yankees had turned the same trick.<sup>322</sup> Thus, it seems clear Cardozo would have been pulling for the Giants when they faced (and beat) the Senators in the 1933 World Series.<sup>323</sup>

If one can imagine Cardozo spending his life as a Giants fan, it should not be hard to believe he would have wanted to be a pitcher.<sup>324</sup> During Cardozo's

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319. *Id.* at 297-99.

320. BASEBALL ROOTS, *supra* note 21, at 390-92; RADER, *supra* note 21, at 78; TOTAL BASEBALL, *supra* note 24, at 38-39 (under the heading "Minnesota Twins"). In the nineteenth century, however, Washington had been a National League city, serving as the home of the Ruby Legs (1880-82), Statesmen (1886-89), and Senators (1892-99). FILICHIA, *supra* note 73, at 244-45.

321. As explained *supra* note 158, the Giants did not begin broadcasting their games on radio until 1939, one year after Cardozo's death. Thus, while in Washington Cardozo would have followed baseball mostly through newspapers, for he "read the *New York Times* and the *Washington Post* the first thing every day." KAUFMAN TEXT, *supra* note 1, at 486. Of course, during the summer, when the Court was in recess and Cardozo repaired to various Westchester County cottages rented for him by Sissie Lehman, *id.* at 485, he would have had no trouble keeping up with the Giants first-hand.

322. TOTAL BASEBALL, *supra* note 24, at 299-300.

323. *Id.* at 309.

324. Hambleton, *supra* note 298, at 463, assigns his top nine judges to different baseball positions and puts Cardozo at second base. Although he provides no explanation, it may be due to the fact that second base is "4" when scoring a baseball game, *see* PAUL DICKSON, THE NEW DICKSON BASEBALL DICTIONARY: A CYCLOPEDIA REFERENCE TO MORE THAN 7,000 WORDS, NAMES, PHRASES, AND SLANG EXPRESSIONS THAT DEFINE THE GAME, ITS HERITAGE, CULTURE, AND VARIATIONS 433 (1999). If this is Hambleton's intention (*i.e.*, to rank Cardozo as the fourth greatest jurist of all time), he is not a very astute student of the game because he reverses the order of the pitcher ("1") and catcher ("2") as well as that of the short stop ("6") and third baseman ("5"). Hambleton's complete list reads as follows:

Oliver Wendell Holmes, Jr., c

John Marshall, p

Joseph Story, 1b

Benjamin N. Cardozo, 2b

Charles Evans Hughes, ss

Hugo Black, 3b

Earl Warren, lf

teenage years, the Giants' best player was catcher Buck Ewing;<sup>325</sup> when Cardozo moved to Washington in 1932, the Giants' biggest star was outfielder Mel Ott.<sup>326</sup> But in the years when Cardozo would have had both the time and the money to really follow the team—from about 1896, when his practice began taking off, to 1914, when he joined the bench and started making regular trips to Albany<sup>327</sup>—the Giants belonged to pitcher Christy Matthewson.<sup>328</sup>

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Louis D. Brandeis, cf

Roger B. Taney, rf

Hambleton, *supra* note 298, at 463.

Another apparently coincidental linking of Cardozo to second base appears in "OYEZ Baseball," an on-line test that challenges readers to find connections between groups of baseball players and the nation's 108 Supreme Court Justices. For Cardozo, the choices are Pasquel Perez, Hack Wilson, Ryne Sandberg, and Earl Weaver, with Sandberg the right answer because:

Cardozo's eloquent pen in his chambers and Sandberg's elegant play in the batter's box and at second base join these two all-time greats. Sandberg was league MVP in 1984, and won a Gold Glove in every season from 1983 to 1989. In 1986, he set an NL record for second sackers with only five errors and a .9938 fielding percentage. Cardozo's prose reads more like poetry than turgid legalese. His Storrs Lectures at Yale, which were published as *The Nature of the Judicial Process* (1921), are still required reading for students of the law and political science.

*Justice Benjamin N. Cardozo*, at <http://baseball.oyez.org> (last visited July 18, 2001).

325. FROMMER, *supra* note 21, at 78 ("William 'Buck' Ewing was the dominant backstop of nineteenth-century baseball."); SCHOTT & PETERS, *supra* note 29, at 151 ("Most, if not all, baseball historians agree that William 'Buck' Ewing was the greatest player of the 19th century. He was an all-around talent—batting, fielding, running and thinking."). Ewing broke into the majors in 1880 with the Troy Trojans, came to New York in 1883, spent the 1890 season with the Players League Giants, returned to the National League Giants in 1891, was traded to the Cleveland Spiders in 1893, and finished out his career with the Cincinnati Reds in 1897. *Id.* at 151-52. A lifetime .303 hitter and the first catcher to throw from a crouched position, he was elected to the Baseball Hall of Fame in 1939. *Id.* at 152.

326. One of the game's most likable figures, Ott spent his entire playing career (1926-47) with the Giants; during his final years (1942-48), he also served as the team's manager. SCHOTT & PETERS, *supra* note 29, at 215-16. Despite his enormous success on the field—511 home runs, .304 batting average, election to the Baseball Hall of Fame in 1951—Ott fared poorly as a manager and his eighth place finishes in 1943 and 1946 led to Leo Durocher's famous quip, "Nice guys finish last." *Id.* at 46, 48; TOTAL BASEBALL, *supra* note 24, at 124.

327. For a description of Cardozo's life during these years, see KAUFMAN TEXT, *supra* note 1, at 71-113. As Kaufman points out, this was the period in which Cardozo took his only real break from work, a grand tour of Europe in the summer of 1907. *Id.* at 96-98. See also POLENBERG, *supra* note 1, at 45 ("Cardozo allowed himself the luxury of only one extended vacation: in 1907 he and Angel Simpson spent several months in Europe, visiting, among other places, London, Paris, Venice, and Berlin.").

328. Known as "Matty" or "Big Six," Matthewson broke into baseball in 1900 and, with the exception of one game, played his entire career with the Giants. BASEBALL ROOTS, *supra* note 21, at 212-13. By the time he left baseball, Matthewson had compiled a 373-188 record, fanned 2502 batters, registered 79 shutouts, led the National League in earned run average 5 times, won 30 games in 4 different seasons, helped the Giants to 5 pennants and 1 World Series championship, and, in



Matthewson was what we would today call a “pitcher’s pitcher;” the legendary manager Connie Mack once said of him, “With Matthewson, it was knowledge and judgment, perfect control and form.”<sup>329</sup> In other words, Matthewson was a professional who excelled at his craft through a mixture of talent and hard work. Cardozo, who has been called “the most *professional* judge” of his generation,<sup>330</sup> would have appreciated Matthewson’s style and decided to emulate him.

Cardozo, who was quite vain,<sup>331</sup> also would have been drawn to pitching because of its importance.<sup>332</sup> Standing in the outfield would have been torture for him, given how rarely such a player touches the ball.<sup>333</sup> Being an infielder would have been no better, for Cardozo craved stability<sup>334</sup> and he would have found it hard to cope with the constant hustle and bustle around the base paths.<sup>335</sup>

With its multitude of responsibilities,<sup>336</sup> catching would have had some appeal to Cardozo. But the physical demands of the position, which are enormous,<sup>337</sup> would have been off-putting.<sup>338</sup>

1936, became an inaugural member of the Hall of Fame. *Id.* For further descriptions of Matthewson’s life and career, see RONALD A. MAYER, CHRISTY MATTHEWSON: A GAME-BY-GAME PROFILE OF A LEGENDARY PITCHER (1993); RAY ROBINSON, MATTY: AN AMERICAN HERO—CHRISTY MATTHEWSON OF THE NEW YORK GIANTS (1993); SCHOTT & PETERS, *supra* note 29, at 189-90; TOTAL BASEBALL, *supra* note 24, at 122-23, 1613.

329. See *Christy Matthewson*, at [http://www.baseball-almanac.com/players/p\\_cmthw0.shtml](http://www.baseball-almanac.com/players/p_cmthw0.shtml) (last visited July 3, 2001).

330. POSNER, *supra* note 1, at 142-43.

331. KAUFMAN TEXT, *supra* note 1, at 153, 183-84, 195, 483; POLENBERG, *supra* note 1, at 133-34; see also *supra* note 15.

332. HENRY HORENSTEIN & BILL LITTLEFIELD, BASEBALL DAYS: FROM THE SANDLOT TO “THE SHOW” 17 (1993) (describing pitching as “the most dramatic center of attention in all of sports”); JOE MORGAN & RICHARD LALLY, BASEBALL FOR DUMMIES 107 (2d ed. 2000) (“Pitching is the most valuable commodity in baseball. Teams don’t reach the postseason without possessing solid *starting rotations* (pitching line-ups) backed by deep *bull pens* (relief pitchers).”).

333. ANDY LOPEZ & JOHN KIRKGARD, COACHING BASEBALL SUCCESSFULLY 97 (1996) (explaining outfielders may go an entire game without ever having the ball hit to them); MORGAN & LALLY, *supra* note 332, at 175 (noting outfielders are far from the action).

334. POLENBERG, *supra* note 1, at 133 (quoting a description of Cardozo “as utterly dedicated to routine as a baby” and providing various examples of his preference for “doing familiar things in familiar places”).

335. For a discussion of such infield plays as grounders, head-first slides, double plays, pop ups, force outs, run downs, cut offs, and suicide squeezes, see LOPEZ & KIRKGARD, *supra* note 333, at 100-03; MORGAN & LALLY, *supra* note 332, at 149-70. See also *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

336. LOPEZ & KIRKGARD, *supra* note 333, at 99-100 (catchers “call the game,” calm rattled pitchers, stop runners from advancing, cut down base stealers, and block home plate); MORGAN & LALLY, *supra* note 332, at 124-25 (same).

337. See MORGAN & LALLY, *supra* note 332, at 124 (noting that one “must have a high threshold

As a pitcher, Cardozo would have shined. Extrapolating from his work habits as a judge,<sup>339</sup> he would have thrown quickly but cautiously with a motion that was compact and efficient; gotten hitters out not with power but by fooling them with his slider;<sup>340</sup> been extremely courteous on and off the field; and stood on the mound in placid repose, far above the fray taking place below him. In short, he would have felt right at home picking up the day's lineup card and finding scribbled there "Cardozo P."<sup>341</sup>

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of pain to play catcher").

338. As will be recalled, Cardozo came from a family of frail individuals, *see supra* notes 8-10, 12, 20 and accompanying text, and was himself slight. *See supra* note 234 and accompanying text. Thus, he tended to shy away from activities that required great exertion:

Once, he was assigned to report to his colleagues on a case that required the court to decide whether using dynamite to blast rock could constitute "recreation" under the terms of an insurance policy. Cardozo commented as follows on various forms of exercise: "The statesman chopping trees is a familiar illustration. Many of us would probably stand aghast at the strenuous diversions of Mr. [Theodore] Roosevelt. I know a judge of the Supreme Court who shovels snows and puts in coal for pleasure. I know another who is an expert carpenter . . . I should not enjoy such things myself."

KAUFMAN TEXT, *supra* note 1, at 149.

339. KAUFMAN TEXT, *supra* note 1, at 130-45, 162-77, 185-86, 472-90; POLENBERG, *supra* note 1, at 123; POSNER, *supra* note 1, at 7, 134-35; Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1 (1979); Rauh, Jr. et al, *supra* note 13, at 5-22.

340. A slider is a trick pitch that baffles through illusion—while it approaches the hitter as a fastball, it breaks like a curveball just as it crosses the plate. DICKSON, *supra* note 324, at 455-56. Of course, Cardozo's opinions have a similar quality, which has led them to be called "elliptical," "convoluted," "incomprehensible," "frustrating," "elusive," and "impenetrable." *See* POSNER, *supra* note 1, at 12, 15 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977) and Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 645 (1987)). For a further discussion of Cardozo's singular writing style, *see* KAUFMAN TEXT, *supra* note 1, at 447-51; POSNER, *supra* note 1, at 10-19, 33-57; Weisberg, *supra* note 221. *See also* POLENBERG, *supra* note 1, at 5 ("Once, describing his indirect manner of expressing himself, Cardozo alluded to his use of 'the veiled phrase and the uncertain line.'").

341. DICKSON, *supra* note 324, at 304, 366 (explaining a lineup card "lists the starting players in their proper batting order and by position," with "P" being used to designate the pitcher).

